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NORTH CAROLINA REPORTS.

VOL. 149.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1908.

(IN PART)

BY

ROBERT C. STRONG,

STATE REPORTER.

RALEIGH:
COMMERCIAL PRINTING COMPANY.
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OF THE

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SPRING AND FALL TERMS, 1908.

(IN PART)

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108121

JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA.

Name.	*District.*	*County.*
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O. H. Guion	Third	Craven.
Charles M. Cooke	Fourth	Franklin.
Oliver H. Allen	Fifth	Lenoir.
William R. Allen	Sixth	Wayne.
C. C. Lyon	Seventh	Bladen.
W. J. Adams	Eighth	Moore.
J Crawford Biggs	Ninth	Durham.
Benjamin F. Long	Tenth	Iredell.
Erastus B. Jones	Eleventh	Forsyth.
James L. Webb	Twelfth	Cleveland.
W. B. Councill	Thirteenth	Watauga.
M. H. Justice	Fourteenth	Rutherford.
Joseph S. Adams	Fifteenth	Buncombe.
Garland S. Ferguson	Sixteenth	Haywood.

SOLICITORS.

Name.	*District.*	*County.*
Hallett S. Ward	First	Beaufort.
John H. Kerr	Second	Warren.
Charles L. Abernethey	Third	Carteret.
Charles L. Abernethy	Fourth	Wilson.
Rudolph Duffy	Fifth	New Hanover
Armistead Jones	Sixth	Wake.
N. A. Sinclair	Seventh	Cumberland.
L. D. Robinson	Eighth	Anson.
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S. P. Graves	Eleventh	Surry.
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Frank A. Linney	Thirteenth	Watauga.
J. F. Spainhour	Fourteenth	Burke.
Mark W. Brown	Fifteenth	Buncombe.
Thaddeus D. Bryson	Sixteenth	Swain.

CALENDAR OF COURTS

TO BE HELD IN

NORTH CAROLINA DURING THE FALL OF 1909.

SUPREME COURT.

The Supreme Court of North Carolina meets in the City of Raleigh on the first Monday in February and the last Monday in August of every year. The examination of applicants for license to practice law, to be conducted in writing, takes place on the first Monday in each term.

The Judicial Districts will be called in the Supreme Court in the following order:

	Fall Term, 1909
First District	August 30
Second District	September 6
Third District	September 13
Fourth District	September 20
Fifth District	September 27
Sixth District	October 4
Seventh District	October 11
Eighth District	October 18
Ninth District	October 25
Tenth District	November 1
Eleventh District	November 8
Twelfth District	November 15
Thirteenth District	November 22
Fourteenth District	November 29
Fifteenth District	December 6
Sixteenth District	December 13

SUPERIOR COURTS.

Fall Terms date from July 1 to December 31.

(The parenthesis numeral following the date of a term indicates the number of weeks during which court may hold).

FIRST JUDICIAL DISTRICT.

Fall Term, 1909—
Currituck—Sept. 6 (1).
Camden—Sept. 13 (1).
Pasquotank—Sept. 20 (1).
Perquimans—Sept. 27 (1).
Chowan—Oct. 4 (1).
Gates—Oct. 11 (1).
Washington—Oct. 18 (1).
Beaufort—Oct. 25 (1); Dec. 6 (3).
Dare—Nov. 9 (1).
Tyrrell—Nov. 15 (2).
Hyde—Nov. 29 (1).

SECOND JUDICIAL DISTRICT.

Fall Term, 1909—
Northampton—Aug. 2 (1); Aug. 9 (1); Nov. 1 (2).
Hertford—Aug. 16 (1); Oct. 18 (2).
Halifax—Aug. 23 (2); Nov. 29 (2).
Bertie—Sept. 13 (1); Nov. 15 (2).
Warren—Sept. 20 (2).

THIRD JUDICIAL DISTRICT.

Fall Term, 1909—
Pitt—Aug. 23 (1); *Aug. 30 (1); Sept. 20 (2); Nov. 8 (1); *Nov. 15 (1); †Dec. 13 (1).
Greene—Sept. 6 (1); Dec. 6 (1).
Craven—Oct. 4 (2); †Nov. 22 (2).
Carteret—Oct. 18 (1).
Pamlico—Oct. 25 (1).
Jones—Nov. 1 (1).

FOURTH JUDICIAL DISTRICT.

Fall Term, 1909—
Franklin—*Aug. 23 (1); Oct. 18 (2).
Nash—*Aug. 30 (1); Nov. 29 (2).
Wilson—Sept. 6 (1); †Nov. 15 (2); *Dec. 20 (1).
Edgecombe—Sept. 13 (1); Nov. 1 (2).
Martin—Sept. 20 (2); Dec. 13 (1).
Vance—Oct. 4 (2).

FIFTH JUDICIAL DISTRICT.

Fall Term, 1909—
Duplin—*July 5 (1); †Aug. 30 (2); Nov. 22 (2).
Sampson—July 12 (1); Aug. 9 (2); Oct. 4 (2); Oct. 25 (2).
Onslow—†July 19 (1); Oct. 18 (1).
New Hanover—*July 26 (2); *Sept. 27 (1); †Dec. 6 (1).
Lenoir—*Aug. 23 (1); †Nov. 8 (2); *Dec. 13 (1).
Pender—Sept. 13 (2).

SIXTH JUDICIAL DISTRICT.

Fall Term, 1909—
Wake—July 12 (2); Sept. 27 (2); †Oct. 25 (2).
Wayne—Aug. 23 (2); †Oct. 11 (2); Nov. 29 (2).
Harnett—Sept. 6 (1); Nov. 15 (1).
Johnston—Sept. 13 (2); Dec. 13 (2).

SEVENTH JUDICIAL DISTRICT.

Fall Term, 1909—
Robeson—July 5 (2); Sept. 13 (1); †Oct. 4 (1); *Nov. 8 (1); †Nov. 29 (1).
Columbus—†July 19 (1); Sept. 6 (1).
Bladen—†Aug. 2 (1); *Oct. 18 (1).
Brunswick—†Aug. 9 (1); Sept. 27 (1).
Cumberland—*Aug. 30 (1); †Oct. 25 (2); †Nov. 22 (1).

EIGHTH JUDICIAL DISTRICT.

Fall Term, 1909—
Lee—July 19 (2); Nov. 22 (1).
Union—*Aug. 2 (1); †Aug. 23 (2); *Oct. 11 (1); Nov. 1 (2).
Richmond—*Sept. 6 (1); †Sept. 27 (1); †Dec. 6 (1).
Chatham—Aug. 9 (1); Nov. 15 (1).
Moore—*Aug. 16 (1); †Sept. 20 (1); †Dec. 13 (1).
Anson—*Sept. 13 (1); †Oct. 4 (1).
Scotland—Oct. 25 (1); Nov. 29 (1).

NINTH JUDICIAL DISTRICT.

Fall Term, 1909—
Granville—Aug. 2 (1); Nov. 22 (2).
Person—Aug. 9 (1); Nov. 15 (1).
Guilford—†Aug. 23 (1); *Sept. 20 (1); †Oct. 25 (2); *Dec. 13 (1).
Durham—*Aug. 30 (1); Oct. 4 (2); †Dec. 6 (1).
Alamance—Sept. 6 (2); *Nov. 8 (1).
Orange—Oct. 18 (1).

TENTH JUDICIAL DISTRICT.

Fall Term, 1909—
Stanly—*July 12 (1); †Sept. 13 (1).
Randolph—July 19 (2); Dec. 6 (2).
Iredell—Aug. 2 (2); Nov. 1 (1).
Davidson—Aug. 16 (1); †Nov. 15 (1).
Rowan—Aug. 30 (2); Nov. 22 (2).
Montgomery—Sept. 20 (2); *Nov. 8 (1).
Davie—Oct. 4 (1).
Yadkin—Oct. 18 (2).

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*For criminal cases only. †For civil cases only.

ELEVENTH JUDICIAL DISTRICT.

Fall Term, 1909—
Forsyth—*July 26 (1); †Sept. 13 (2); *Oct. 11 (1); †Dec. 6 (2).
Stokes—*Sept. 27 (1); †Oct. 4 (1).
Caswell—Oct. 18 (1).
Ashe—Oct. 25 (2).
Rockingham—*Aug. 2 (1); †Nov. 8 (2).
Alleghany—Aug. 23 (1).
Surry—†Aug. 30 (2); Nov. 22 (2).

TWELFTH JUDICIAL DISTRICT.

Fall Term, 1909—
Mecklenburg—†July 19 (2); *Aug. 16 (2); Sept. 27 (2); Nov. 29 (2).
Cleveland—Aug. 2 (2); Nov. 8 (2).
Cabarrus—Aug. 30 (1); Oct. 25 (2).
Lincoln—Sept. 6 (1); Dec. 13 (1).
Gaston—Sept. 13 (2); Nov. 22 (1).

THIRTEENTH JUDICIAL DISTRICT.

Fall Term, 1909—
Catawba—July 12 (2); Nov. 1 (2).
Mitchell—†July 26 (2); Nov. 15 (2).
Wilkes—Aug. 9 (1); †Oct. 11 (2).
Caldwell—Aug. 30 (2); Nov. 29 (2).
Wautauga—Sept. 13 (2).
Alexander—Sept. 27 (2).

FOURTEENTH JUDICIAL DISTRICT.

Fall Term, 1909—
McDowell—July 26 (2); Sept. 20 (2).
Burke—Aug. 9 (1); Dec. 6 (2).
Rutherford—†Aug. 23 (2); Nov. 1 (2).
Yancey—Sept. 16 (2).
Henderson—*Oct. 4 (2); Nov. 15 (2).
Polk—Oct. 18 (1).

FIFTEENTH JUDICIAL DISTRICT.

Fall Term, 1909—
Buncombe—Aug. 2 (2); Sept. 13 (2); †Oct. 4 (2); Nov. 15 (2); †Dec. 6 (2).
Madison—Aug. 16 (2); †Nov. 1 (2).
Transylvania—Aug. 30 (2); Nov. 29 (1).

SIXTEENTH JUDICIAL DISTRICT.

Fall Term, 1909—
Haywood—July 12 (2); Sept. 27 (2).
Swain—July 26 (2); Oct. 25 (2).
Cherokee—Aug. 9 (2); Nov. 8 (2).
Graham—Sept. 6 (2).
Clay—Sept. 20 (1).
Jackson—Oct. 11 (2).
Macon—Nov. 22 (2).

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*For criminal cases only. †For civil cases only.

UNITED STATES COURTS FOR NORTH CAROLINA

CIRCUIT COURT.

JETER C. PRITCHARD, Judge, Asheville, N. C.

DISTRICT COURTS.

EASTERN DISTRICT. Thomas R. Purnell, Judge, Raleigh.
WESTERN DISTRICT. James E. Boyd, Judge, Greensboro.

UNITED STATES CIRCUIT COURT.

EASTERN DISTRICT.

Terms.—Raleigh, fourth Monday after the fourth Monday in April and October. H. L. Grant, Clerk; George L. Tonnoffski, Deputy Clerk.

Wilmington, second Monday after the fourth Monday in April and October. Samuel P. Collier, Clerk; James K. Collier, Deputy Clerk.

New Bern, fourth Monday in April and October. George Green, Clerk.

Elizabeth City, second Monday in April and October. Thomas J. Markham, Clerk.

Washington, third Monday in April and October. H. L. Grant, Clerk; George L. Tonnoffski, Deputy Clerk.

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Claudius Dockery, United States Marshal, Raleigh.

H. L. Grant, Clerk United States District and Circuit Courts for the Eastern District of North Carolina, Goldsboro.

Samuel P. Collier, Clerk United States District and Circuit Courts for the Eastern District of North Carolina, Wilmington.

George L. Tonnoffski, Raleigh, Deputy Clerk.

WESTERN DISTRICT.

Terms.—Circuit and District terms are held at the same time and place, as follows:

Greensboro, first Monday in April and October. Samuel L. Trogden, Clerk.

Statesville, third Monday in April and October. H. C. Cowles, Clerk.

Asheville, first Monday in May and November. W. S. Hyams, Clerk.

Charlotte, second Monday in June and December. H. C. Cowles, Clerk.

OFFICERS.

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A. L. Coble, Assistant United States District Attorney, Statesville.

J. M. Milliken, United States Marshal, Greensboro.

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ERRATA

NANCE v. RAILROAD.

(Page 366).

ACTION tried before *Justice, J.*, and a jury, at April Term, 1908, of SURRY. Plaintiff appealed.

STATE v. STRATFORD.

(Page 483).

TRIAL upon a charge of murder in the second degree. Appeal by defendant from *Jones, J.*, March Criminal Term, 1908, of UNION.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA,

AT RALEIGH.

FALL TERM, 1908.

L. W. McCOY v. CAPE FEAR LUMBER COMPANY et al.

(Filed 28 October, 1908).

1. **Deeds and Conveyances—Title—Evidence—Common Source—Rule of Convenience.**

When both parties to a controversy involving the title to land claim under the same person, it is not competent for either, as such claimant, to deny that the common grantor had title.

2. **Same.**

When the rule applies that parties claiming land under a common source are not required to show title beyond, it is not in strictness an application of the doctrine of estoppel, precluding a party from showing and establishing title superior to that of the common source and connecting himself with it; but the rule is established for the convenience of parties, relieving each from the necessity of proving title back of the common source when it is perfectly apparent that both of them are acting in recognition of that title as the true one.

3. **Same—Timber—Deeds.**

When, in an action for spoil and wrong to the land, the owner of the common source of title holds a deed purporting to convey to him the fee in lands, or he is in possession thereof claiming to own them, and then conveys a restricted interest therein, in this case the right to cut and remove therefrom timber of specified size, the grantee of the restricted interest cannot deny the title of the common source, so as to make it necessary for the grantor to show his title beyond, in order to recover.

4. Same.

Plaintiff and his grantor were in possession under deed of certain lands claiming them as absolute owners, one as reversioner and the other as life tenant. They conveyed to one of the defendants the right to cut and remove from the lands the timber of a specified size, who, in his turn, and after the death of the life tenant, entered into contract with the other defendant to cut and remove the timber for them. Thereafter, the plaintiff brought suit for damages arising from defendant's spoil and wrong to the land. *Held*, that, as according to his own deed, in evidence, the plaintiff was the owner of the lands, claiming them as his own, it was not necessary for him to prove his title further, in order to recover damages in a suit against those to whom he had conveyed the restricted estate.

Action tried before *Neal, J.*, and a jury, at March Term, 1908, of Pender County.

There was evidence tending to show, that, under certain deeds from plaintiff, and those under whom he claimed, conveying to defendants the standing timber of certain dimensions, within a given boundary of land, with the right to enter, cut and remove same, said defendants or their grantees had entered and cut the timber on said land not included in their deed or contract, and had wrongfully committed other spoil and injury to said land not contemplated or authorized by said deed.

Under the charge of the Court, the jury rendered the following verdict:

"1st. 'Is the plaintiff the owner of the lands and premises described in the complaint?'

Answer: 'Yes.'

2d. 'Did the defendant, C. W. Mitchell and W. P. Taylor, trading as Mitchell & Taylor, unlawfully and wrongfully cut and remove timber, cross ties, wood, and otherwise injure the plaintiff as alleged in the complaint?'

Answer: 'Yes.'

3d. 'Did the defendant, New Hanover Shingle Company, unlawfully and wrongfully, cut and remove timber, cross ties and wood, and otherwise injure the plaintiff as alleged in the complaint?'

Answer: 'Yes.'

4th. 'What damage is the plaintiff entitled to recover?'

Answer: '$1,000.00.' "

There was judgment, on the verdict, for plaintiff, and defendant excepted and appealed.

R. G. Grady, E. K. Bryan and *C. E. McCullen* for plaintiff.

Meares and *Ruark* for defendant.

Hoke, J., after stating the case: The objections chiefly urged to the validity of the trial below are for alleged errors in the determination of the 1st issue, that addressed to the plaintiff's ownership of the land on which the timber was situated. In *Whitaker v. Cawthorne,* 14 N. C., 390, *Daniel, J.,* delivering the opinion, quotes with approval the statement of Blackstone in reference to the term "land":

"If a man grant all his lands, he grants thereby all his mines of metal, and other fossils, his woods, his waters, and his house, as well as his fields and meadows."

And, in determining the ownership of this important species of property, it is a rule well recognized with us, that when both parties claim title under the same person it is not competent for either, as such claimant, to deny that such person had the title. *Fisher v. Mining Co.,* 94 N. C., 397; *Christenburg v. King,* 85 N. C., 230; *Worsley v. Johnson,* 50 N. C., 72; *Register v. Rowell,* 48 N. C., 312; *Johnston v. Watts,* 46 N. C., 228; *Ives v. Sawyer,* 20 N. C., 50. This is not in strictness an application of the doctrine of estoppel, but is a rule established for the convenience of parties in actions of this character, relieving them of the necessity of going back further than the common source when it is apparent that both parties are acting in recognition of this common source as the true title. *Warren v. Williford,* at present term.

In *Christenbury v. King, supra, Ashe, J.*, for the Court, in speaking of this rule, said: "It is well settled as an inflexible rule, that where both parties claim under the same person, neither of them can deny his right, and then, as between them, the elder is the better title and must prevail. To this rule there is an exception, when the defendant can show a better title outstanding, and has acquired it." And further on in the same opinion: "It must be borne in mind, that the general rule applicable to cases like this, is not strictly an estoppel, but a rule of justice and convenience adopted by the courts to relieve the plaintiff in ejectment from the necessity of going back behind the common source, from which he and the defendant derive title, and deducing his title by a chain of mesne conveyances from the State." Citing *Frey v. Ramsour,* 66 N. C., 466.

There is a class of cases which hold that when a party, having the weaker claim, is holding under a grant or deed from the common source, which creates a special interest in the property, or conveys a restricted estate therein, and nothing else appears but the production of such a grant or deed, the rule only applies to the extent of the interest created or to the amount of the estate conveyed. But this apparent limitation of the rule does not obtain when it is made to appear, further, that the owner of the common source of title, at the time he created the special interest in the property or conveyed the particular estate, had a deed for the land which purported to convey to him the fee, or was in the actual possession of the property claiming to own it. And especially is this true when the common grantor professes in his deed to be the true owner. An instance and illustration of this position will be found in *Worsley v. Johnson, supra*, where it was held: "Where a person made a deed to another, conveying a life-estate in an unoccupied lot of land, and such life-estate conveyed the premises in fee simple, it was held that such purchaser is not precluded, by the rule of practice in ejectment, from denying the title of the vendor, beyond the life-estate conveyed, and the heirs of such vendor, can only recover by showing, either that their ancestor had a deed for the land purporting to convey a fee, or that he was in possession of the premises claiming a fee." And this decision is recognized and approved in *Fisher v. Mining Co., supra.*

In such case the question is, did the common grantor profess to be the real owner, and the grantee of a limited estate take in recognition of that claim. Applying this principle to the facts presented, there is no error in the record which gives the defendant any just ground for complaint. It appears that, in 1893, one Fred McKoy, the grantor of plaintiff, and plaintiff himself, claiming the property as absolute owners, one as life-tenant and the other as reversioner and in possession of same, conveyed to the Cape Fear Lumber Company the standing timber on the land in question that would measure 10 inches and upwards, with the privilege to enter said land and cut and carry away the timber within twenty years from date, etc. "All the timber trees on our tract of land of the following dimensions," are the words of the instrument describing the interest conveyed. After the execution of this conveyance, to-wit, in 1903, and six or seven years after the death of Fred McKoy, the life-tenant, and leaving the plaintiff, according to the terms of his own deed, the sole owner of the land, the Cape Fear Company conveyed the property to the other defendants, stipulating that these grantees should cut and sell to said company all the merchantable timber on the land, which said grantees did not use, at a certain price per thousand, etc.; that these grantees entered, under this deed of the Cape Fear Lumber Company, and committed the spoil and wrong, and to the amount established against them by the verdict.

It will be thus seen that the Cape Fear Lumber Company bought the timber on the land in recognition of Fred McKoy, plaintiff's grantor, and plaintiff himself, as the true owners of the property, and the defendants, having entered under and by virtue of these deeds from the Cape Fear Lumber Company, are also in under Fred McKoy and plaintiff himself, and in recognition of their title, unless and until they can show a better title outstanding, and connect themselves with it.

There is no reversible error in the record, and the judgment below will be

Affirmed.

VANSTORY CLOTHING COMPANY v. STADIEM et al.

(Filed 5 November, 1908).

1. **Issues—Evidential—Matters in Controversy.**
   Issues tendered which are evidential and do not present the true matters in controversy are properly refused.
2. **Contract—Breach by Vendee—Vendor in Possession—Vendor's Sale in Good Faith—Measure of Damages.**
   On breach of contract by vendee in a sale of a stock of merchandise, the vendor, remaining in possession, may resell the goods with utmost good faith and with diligence as agent of the vendee, and recover, as damages, storage and interest on the purchase price, together with the difference between the price at which it was thus sold and that agreed upon in the contract. The question whether the resale was at a fair price is for the jury. (*Heiser v. Meares*, 120 N. C., 443, cited and distinguished).

ACTION tried before *Jones, J.*, and a jury, August Term, 1908, of GUILFORD. Defendants appealed.

The plaintiff on 15 August, 1906, sold the defendants a stock of goods for $6,900 cash. The defendants gave a check for $500, but it was protested and, no part of the purchase money being paid, the plaintiff retook possession of the goods after the defendants had held them ten days. The evidence for plaintiff is, that it held the goods till 25 October, 1906, subject to defendants' orders, when, after due notice, it sold them for $5,500; that the defendants left the goods in bad condition and torn up, many being on the floor; that the goods were worth $1,500 more on 15 August than when resold; that the plaintiff lost the use of store-room two months and ten days, storage being worth $20 to $25 per month; that plaintiff used every effort, after defendants' refusal to pay for the goods, to sell them at the best possible price, writing many letters to parties in and out of the State who were likely to buy, and inducing some of them to come to Greensboro to examine the goods; that the defendants were notified that if they did not take the goods the plaintiff would sell them, and the defendants paid no attention to the notice. The defendants offered no evidence.

The defendants tendered as issues:

1. Did the plaintiff resell the goods within a reasonable time, and did he use reasonable diligence in effecting a sale?

2. Was the sale a fair one?

The Court submitted instead: 1. Did the plaintiff and defendants enter into a contract for sale of the goods at the price of $6,900? 2. Did the defendants refuse and fail to comply with the contract of sale? 3. What damage, if any, has the plaintiff sustained by the breach of the contract of sale? The jury responded "Yes" as to the first two issues and $1,500 as to the third.

John A. Barringer and *W. P. Bynum, Jr.*, for plaintiff.
Stedman & Cooke for defendants.

CLARK, J., after stating the facts: The exception of the defendants as to issues cannot be sustained. Those they tendered were evidential in their nature. Those submitted by the Court were proper. Besides, under the issues offered by defendants, the amount of damages, the true matter in controversy, could not have been determined.

The only other exception requiring our consideration is the refusal of the Court to give the following request to charge, "If the jury shall find from the evidence that the market value of the goods was $6,900 at the time of the breach of contract, the plaintiff would be entitled to recover nothing, and you will answer the third issue "Nothing." That is to say, if the goods were worth what plaintiff sold them to defendants for, the defendants were privileged to refuse to take them.

This prayer could not be given for many reasons. The breach of contract, nothing else appearing, entitled the plaintiff at least to nominal damages. The plaintiff was also entitled to recover storage, and interest on the purchase price, while making reasonable and proper efforts to resell the goods. Besides, the defendants, after their wrongful act, are not entitled to be allowed, in abatement of damages, the market price at the time of the breach of the contract, but only, if we follow the terms of the issues tendered by themselves, that the goods should be sold within a reasonable time, using reasonable diligence in effecting a sale, and that it should be a fair sale.

In *Grist v. Williams*, 111 N. C., 53, it is held, that, if the vendee refuses to pay for and receive the goods, the vendor has the right either to rescind the contract or resell the goods and recover from the vendee the difference in price. In making such resale he is considered as acting as the agent of the vendee. 1 Benjamin Sales, 1077, *note*. Of course, he must act in the utmost good faith and with diligence. We know not what instructions his Honor gave on this point, but they were satisfactory to the defendants, for they have made no exceptions to the charge.

The defendants rely upon *Heiser v. Meares*, 120 N. C., 443. That was where an executory contract for the manufacture of goods was rescinded before the work was finished, and the Court distinguished between the measure of damages in such a case and in a case like the present, saying: "In a contract for the sale of specific articles then in existence and ready for delivery when the purchaser refuses compliance, the seller has three remedies at his option: To treat the property—

1. As his own and sue for damages.

2. As the property of the buyer and sue for the price.

3. As the property of the buyer and resell it for him and sue for the difference between the contract price and that obtained on the resale." The latter option was exercised by the plaintiff herein. The Court, in *Heiser v. Meares,* said that a different rule obtained where the contract was for goods thereafter to be manufactured, because when the vendor "was notified of the recission of the agreement, it seems unreasonable that he should continue to manufacture and thus continue to increase his damages." Therefore, in such case, the damages are to be measured "at the time of the breach."

Under the charge herein, to which the appellants did not except and which is therefore not sent up, the jury evidently did not think that the $5,500 obtained on a resale was a fair price, but found that the plaintiff should have obtained something over $6,000, for though the plaintiff was entitled to storage, interest and an allowance for his time as agent in reselling, the damages are assessed at $900. The defendants have no ground to complain.

No error.

G. E. HAWK v. THE PINE LUMBER COMPANY.

(Filed 5 November, 1908).

Plaintiff's Appeal.

1. **Contracts, Breach of—Measure of Damages—From What Time Estimated.**

   Parties to a contract are presumed to have contracted with reference to the damages which would arise from a breach thereof under the conditions existing at the time of the breach.

2. **Same—Evidence—Matters in Diminution of.**

   When a party to a contract thereby agreed to log the lands of the other party at a certain price, and was prevented from fulfilling his agreement by the breach thereof of the other, evidence of the subsequently increased price of labor, for the purpose of showing a diminution in the profits of logging during the period of time required to fulfill the contract, is incompetent, and a charge to the jury based upon that theory is erroneous.

3. **Appeal and Error—Supreme Court—Discretion—New Trial as to All Issues.**

   When error is found on appeal as to some of the issues submitted in the lower court, the Supreme Court may, in its discretion, grant a new trial as to all, when it appears that injustice would otherwise be done to one or both of the parties litigant.

ACTION tried before *Lyon, J.*, and a jury, November Term, 1907, of CRAVEN.

The plaintiff alleged that, on 4 January, 1902, he had entered into a contract with the defendant to log certain timber lands owned by it, the defendant to furnish the necessary equipment, to provide for the means for performing the contract, which were to be charged to the plaintiff, who was credited each month with the logs delivered by him. Statements were furnished each month showing the balance due. The plaintiff further alleged that the land was well timbered and the contract, if performed, would have enabled him to realize a profit of $100,000. There were allegations as to the respective duties and obligations of the parties, and evidence to sustain the same. The essential facts are stated in *Hawk v. Lumber Co.*, 145 N. C., 58.

The contract was, of course, unperformed at the time of the breach, and the evidence tended to show that it would have taken several years to complete the work under it. The breach occurred in November, 1903. The estimates as to the quantity of timber on the land varied considerably, the plaintiff's evidence tending to show that there were between 150,000,000 and 200,000,000 feet of timber and 20,000 acres of land, while the evidence of the defendant tended to show that there were only 5,000 acres and from 30,000,000 to 40,000,000 feet of timber.

The Court permitted a witness, Benjamin Moore, over the objection of the plaintiff, made in apt time, to testify as follows: That "it would not have cost less than $4.50 or $5, at least, to log the land in 1904, 1905, 1906 and 1907, and that wages had increased since 1903 something like 50 per cent." Other witnesses were permitted to testify to the same facts. The plaintiff requested the Court to charge the jury as follows: "If the jury shall find that the defendant wrongfully broke its contract with the plaintiff, he is entitled to have his damages assessed upon the conditions as they existed at the time of the breach, and they will not consider whether the expense of logging has increased since that time, or decreased, but will estimate his damages upon the conditions then existing, and the estimate should be based upon the present value of the contract at the time of the breach." This instruction was refused and the plaintiff excepted. The Court charged the jury as follows: "1. The sixth issue is, what damage has the plaintiff sustained by reason of the wrongful breach of the contract? The burden of this issue is on the plaintiff. Should you answer the first, second and third issues 'Yes,' the plaintiff will be entitled to recover the difference between the contract price, which is agreed was three dollars per thousand feet, and the cost of cutting, hauling and loading the logs on the cars of the Norfolk & Southern Railway Company at Croatan, of all the merchantable timber that was left on the land at the date the plaintiff stopped work for the defendant company." Plaintiff excepted to this part of the charge.

"2. You must find the quantity of timber on the land that was embraced in the contract, the number of feet and the amount that it would cost the plaintiff to deliver said logs on board the cars of the Norfolk & Southern Railway Company at Croatan, at the time or times said logs were to be delivered, under the terms of the contract. Should you find that it would cost three dollars per thousand feet or more, the plaintiff would not be entitled to recover any amount on account of said logs, for there would be no profit in it to him." The plaintiff excepted to each of these instructions.

The issues and the answers thereto were as follows:

1. Did plaintiff and defendant enter into the contract as alleged in the complaint? Answer: Yes.

2. Did the plaintiff perform the contract on his part as fully as he was permitted to do by defendant? Answer: Yes.

3. Did the defendant wrongfully break the contract and prevent the plaintiff from further performance thereof? Answer: Yes.

4. Did the defendant wrongfully convert the personal property of the plaintiff as alleged in the complaint? Answer: Yes.

5. What damage has plaintiff sustained by the wrongful conversion of his personal property? Answer: $1,359.

6. What damage has plaintiff sustained by the wrongful breach of the contract? Answer: $2,250 with interest on same.

7. Have the matters and things complained of been heretofore adjudicated as to the conversion of the personal property, as alleged in the answer? Answer: Yes.

8. Have the matters and things alleged in the complaint, other than the conversion of the personal property, been here-

tofore adjudicated, as alleged in the answer? Answer: No.

The plaintiff moved for a new trial, which was refused, and judgment was entered upon the verdict. He then excepted and appealed.

W. D. McIver and *D. L. Ward* for plaintiff.

W. W. Clark, Simmons, Ward & Allen and *Moore & Dunn* for defendant.

WALKER, J. We are of the opinion the Judge erred in admitting the testimony of Benjamin Moore and other witnesses as to facts supervening the breach of the contract, that is, the cost of logging after the breach and the increase in the rate of wages, and also in refusing the plaintiff's prayer for instruction. This case, in respect to the damages recoverable for the breach of the contract is governed by *Wilkinson v. Dunbar* (decided at this term). We held there that, while the entire damage must be assessed, present and prospective, the measure of damages is the value of the contract at the time of the breach. Justice Hoke, for the Court, says in that case: "There was evidence offered tending to show that this contract would have required some years in its performance beyond the time when a breach was established, and, as to this prospective damage, that to arise in the time required for performance after such breach, the correct rule would be the present value of the difference between the contract price and the cost of performance. We hold, as stated, that recovery for this prospective damage can be had, but defendant is only entitled to the present value of his contract, and, in so far as such damage is allowed by anticipation, proper allowance should be made for the fact that present recovery is had for damage that would only have accrued at a future time. This position as to the correct rule for determining values to arise and accrue in the future, when a present recovery is allowable, is very well illustrated in the case of *Pickett v. R. R.*, 117 N. C., 616." He cites the leading and authoritative case of *Masterton v. Mayor,* 7 Hill, 61, in which it was held: "(a) When one party to an executory contract puts an end to it by refusing to fulfill, the other party is entitled to an equivalent in damages for the gains and profits which he would have realized from performance.

"(b) The measure of damages, in respect to so much of the contract as remained wholly unperformed at the time of the breach, is the difference between what the performance would have cost the plaintiff and the price which the defendant had agreed to pay.

"(c) In estimating what the performance would have cost the plaintiff, the Court and jury should be governed by the price of labor and material at the time of the breach, paying no attention to subsequent fluctuations of the market." This, of course, means actual fluctuations.

The language of Chief Justice Nelson (afterwards a Justice of the Supreme Court of the United States) is especially applicable to our case. He says: "Where the contract, as in this case, is broken before the arrival of the time for full performance, and the opposite party elects to consider it in that light, the market price on that day of the breach is to govern in the assessment of damages. In other words, the damages are to be settled and ascertained according to the existing state of the market at the time the cause of action arose, and not at the time fixed for full performance. The basis upon which to estimate the damages, therefore, is just as fixed and easily ascertained in cases like the present, as in actions predicated upon a failure to perform at the day."

The concurring opinion of *Bronson, J.*, is equally as strong and explicit in stating the same principle. The rule, as now formulated by this Court, and governing in such cases as this one, is well supported, not only by *Masterton v. Mayor, supra,* but by the other cases which will be found in the learned and forceful opinion of *Justice Hoke*. We need not refer to them *seriatim* and make special comment upon the reasons assigned therein for the conclusion reached by the Courts of Alabama, Iowa, Wisconsin and Illinois, and by this Court in *Oldham v. Kerchner,* 79 N. C., 106, as it will suffice to say, generally, that they fully and conclusively sustain the rule as one both simple in its application, certainly less speculative than any other, and eminently just and proper. We again commend its wisdom, as it fixes a sure standard for assessing the damages, and prevents a jury from entering into the field of uncontrolled conjecture and speculation, which might result in many cases most disastrously to the offending party. He surely should not complain of it, and his adversary has no ground for criticism of it, as a proper criterion of what he should receive, as he gets, under it, all that he could have contemplated that he would receive, and he also receives a benefit from the fact that we exclude from the consideration of the jury vague surmise and conjecture as to what the future market, with respect to the cost of labor and material, and other elements of damages, will actually be. The fact that the market will fluctuate and that prices will rise or fall may be considered in estimating the damages, but not any particular or actual damage which may have occurred in future conditions. The presumption is that he estimated his profit upon the basis of the conditions existing at the time of the breach, if there should be one, or that is, at least, as close an approximation as we can possibly make, with reference to what was in the minds of the parties and within their reasonable expectation, when they made the contract. This ruling entitles the plaintiff to a new trial. The instructions of the Court, Nos. 1 and 2, would seem to be somewhat inconsistent, though it is possible we may be mistaken as to this, and not clearly understand them with reference to each other, so as to be able to reconcile them. The last instruction was erroneous, under the rule laid down by us, especially when considered in connection with the incompetent evidence admitted and the instruction asked by the plaintiff, which was rejected.

We think that, under the peculiar circumstances of this case, the new trial, which we award, should extend to all the issues, for the reason, among others which are controlling, that the facts of the case may be more fully developed and the questions intended to be presented, more clearly presented. To do otherwise might result in injustice to one or both of the parties. We grant the new trial generally in the exercise of the discretion which belongs to this Court, as has been so often decided. *Burton v. R. R.*, 84 N. C., 192; *Holmes v. Godwin*, 71 N. C., 306; *Meroney v. McIntyre*, 82 N. C., 103; *Strother v. R. R.*, 123 N. C., 197; *Hall v. Hall*, 131 N. C., 185; *Benton v. Collins*, 125 N. C., 83; *Nathan v. R. R.*, 118 N. C., 1066.

Let there be a new trial as to all the issues.

New trial.

G. E. HAWK v. THE PINE LUMBER COMPANY.

(Filed 5 November, 1908).

Defendant's Appeal.

1. **Instructions—Credibility of Witnesses—Questions for Jury.**
   An instruction which deprives the jury of the right to pass upon the credibility of the witnesses is properly refused.
2. **Appeal and Error—Both Parties Appeal—New Trial.**
   When a new trial has been granted by the Supreme Court in the appeal of one of the parties litigant, the appeal in the same action by the other party will be dismissed.

ACTION tried before *Neal, J.*, and a jury, November Term, 1907, of CRAVEN.

W. D. McIver and *D. L. Ward* for plaintiff.

W. W. Clark, *Simmons, Ward & Allen* and *Moore & Dunn* for defendant.

WALKER, J. This is an appeal by the defendant, from the refusal of the Court to grant a new trial, because the Court refused to give the jury, as requested to do so by his counsel, the following instruction: "Upon the whole evidence, you will answer the eighth issue 'Yes.'" The issues are set out in the plaintiff's appeal and reference is made thereto. The request was not in proper form, as it deprived the jury of the right to pass upon the credibility of the witnesses. *Mfg. Co. v. R. R.*, 128 N. C., at pp. 284, 285, and cases cited; *Merrell v. Dudley*, 139 N. C., 57. The burden of the eighth issue was upon the defendant.

But we will not decide the case upon the inaccurate and disapproved form of the prayer. If we did so, it would affirm the judgment in this appeal. In the plaintiff's appeal we have directed a new trial, as to all the issues, and this appeal, therefore, becomes unnecessary, for the defendant will get what it is asking for by our giving a new trial in that appeal. Therefore, the proper course now is to dismiss this appeal.

Appeal dismissed.

J. A. LEAK v. BANK OF WADESBORO.

(Filed 5 November, 1908).

1. **Personal Property—Evidence of Sale—Registration—Mortgage.** A paper writing evidencing that the maker voluntarily turned over to the sheriff, to be held for the bank, certain personal property, to be delivered to the bank to partly cover checks drawn by the maker on the account of another, is a sale, and requires no registration as against a mortgage subsequently given on the property mentioned; and evidence, on the part of the bank, tending to show a valid indebtedness of the maker to it, is competent, being relevant to support the bank's title in case impeaching testimony is offered.

ACTION tried before *Jones, J.*, and a jury, at June Term, 1908, of ANSON, for the recovery of a horse.

The following issues were submitted and responded to by the jury:

"1. Is plaintiff the owner and entitled to the possession of the horse described in the complaint? Answer: 'Yes.'

"2. What is the value of the horse? Answer: '$150.'"

There was judgment on the verdict for plaintiff and defendant excepted and appealed.

McLendon & Thomas for plaintiff.
Robinson & Caudle for defendant.

PER CURIAM: The plaintiff offered in evidence a chattel mortgage on the horse in question, to secure a note of $100.30, duly registered in Anson, the proper county, on the 2d day of September, 1907. The defendant offered in evidence the following paper writing, the execution of which was properly proven, and as of the date appearing on the face, 31 August, 1907, and proved the delivery of the property described in the paper writing to the sheriff of Anson County on the day of its execution:

"ALBEMARLE, N. C., August 31, 1907.

"I, E. B. Dunlap, do hereby freely of my own will and volition, turn over, surrender and deliver to J. D. Love, Sheriff of Stanly County, to be held by him for the Bank of Wadesboro, Wadesboro, N. C., and to be delivered by him to said bank, one bay mare, one Henderson Ruff rubber tire top buggy, the harness and bridle, collar with same, all now in the livery stable of S. D. Klutz at Albemarle, N. C., also one new suit of clothes, now at my father's home in Anson County. This property is delivered to said bank to partly cover some checks on said bank which I have drawn on E. C. Dunlap's account.

"This 31 August, 1907.

E. B. DUNLAP."

Witness: R. L. Smith.

This paper has not been registered. Defendant further offered evidence tending to show the existence of a valid demand existent in favor of defendant bank against the said E. B. Dunlap, and that the property in question was turned over in satisfaction of this claim. The Court, after hearing the testimony, on motion excluded the same, holding: that the testimony admitted, tending to show that there had been a sale of the property to defendant, was admissible; that the paper writing, under which defendant claimed the property, was on its face a chattel mortgage or an assignment requiring registration, and not having been registered, same was invalid as against the plaintiff's claim; and charged the jury, if they believed the testimony, to answer the first issue "Yes." Defendant excepted.

The Court is of opinion that there was error in the ruling of the Court below. The paper writing, on its face, purports to be a sale effecting an absolute transfer of the property, and, so far as the evidence now discloses, no registration of same is or was required. This sale having taken place prior to the registration of plaintiff's mortgage, the title of defendant to the horse is good, unless and until the same is in some way impeached. And the testimony offered by defendant, which was first admitted by the Court and afterwards struck out for the reasons indicated, would be relevant in support of defendant's title in case impeaching testimony is offered.

There is error, and a new trial is awarded.

New trial.

W. H. WILKINSON v. W. H. DUNBAR.

(Filed 5 November, 1908).

1. **Contracts, Breach of—Damages Present and Prospective—Procedure.**

When there has been a definite and absolute breach of a contract which is single and entire, all damages, both present and prospective, suffered by the injured party, may and usually must be recovered in one and the same action.

2. **Contracts, Breach of—Prospective Profits, When Recoverable.**

When prospective damages are allowed to the injured party as arising under a breach of contract, they must be such as are in reasonable contemplation of the parties and capable of being ascertained with a reasonable degree of certainty; and while profits prevented are frequently held to be excluded, they are those expected by reason of collateral engagements, or dependent to a great extent on the uncertainty of a trade and fluctuations of the market.

3. **Contracts, Breach of—Prospective Profits, How Estimated.**

When an injured party to a contract is entitled to recover prospective damages, proper allowance should be made for the fact that recovery is had for damages that would have accrued at a future time, and the Courts and juries should see that such is made for those fluctuations, which are likely to occur. Where, however, the recovery is for the cutting and delivery at a certain price of several millions of feet of timber, a contract requiring years in its performance beyond the time when the breach was established, it was error in the trial Judge to instruct the jury, generally, that the measure of damages was the difference between the amount to be paid for the work and the cost of performance. This is correct as to damages already accrued, but, as to those to arise in the future, the rule should be the present value of such damages.

4. **Contracts—Prospective Profits—Contemplation of Parties.**

Prospective profits are advantages which are the direct and immediate fruits of the contract entered into between the parties, are a part and parcel of the contract, and presumed to have been taken into consideration at the time it was made.

5. **Witnesses—Expert Testimony as to Facts.**

Witnesses shown to be familiar with the tract of land, and lumbermen of experience having personal knowledge of the facts and conditions, may give their opinion as to the cost of cutting and

delivering timber, and the profits per thousand feet, when the same is relevant to the inquiry in a suit for damages arising from a breach of contract.

ACTION tried before *O. H. Allen, J.,* and a jury, Fall Term, 1907, of HYDE.

Plaintiff instituted suit against defendant, and declared on four causes of action for alleged breach of different contracts on part of defendant, claiming damages therefor in amounts varying from $500 to $100. Defendant answered denying the allegations of the complaint, and alleging, by way of counterclaim, breach of contract on part of plaintiff, under which plaintiff had contracted and agreed to pay defendant $3.50 per thousand feet to cut and haul the timber from two certain tracts of land, the timber amounting to several million feet. Plaintiff replied denying the alleged counterclaim. On issues submitted, there was a verdict for plaintiff on his first cause of action, the jury assessing plaintiff's damages at $128.99 with interest from 19 May, 1902. And there was verdict for defendant on his counterclaim for $4,000. Objection was made to the ruling of the Court, which allowed defendant and some other witnesses, known to be familiar with the tract of land, and lumbermen of experience, to give their opinion as to the cost of cutting the timber and delivering same to the tug-boat pursuant to the stipulations of the contract, and the profit per thousand feet to accrue according to the contract price.

Exceptions were also made to allowing the jury to award prospective damages, the plaintiff contending that, under the terms of the contract and the attendant facts and circumstances, these damages were too indefinite and uncertain to be made the basis of legal demand, and excepting, further, to the rule laid down by the Court under which such damages were to be admeasured.

There was judgment on the verdict for defendant and plaintiff excepted and appealed.

S. S. Mann and *Small, MacLean & McMullen* for plaintiff.
Ward & Grimes and *W. M. Bond* for defendant.

HOKE, J., after stating the case: It was chiefly objected to the validity of defendant's recovery, that the profits of the contract claimed and allowed as damages, on defendant's counterclaim, involved too many elements of uncertainty to be made the basis of a legal award of prospective damages, and the same should have been rejected, on the ground that they are "speculative" and "contingent," but we are of opinion that the objection cannot be sustained.

It is well established, that where there has been definite and absolute breach of a contract which is single and entire, that all damages, both present and prospective, suffered by the injured party, may and usually must be recovered in one and the same action, and, when prospective damages are allowed, they must be such as were in reasonable contemplation of the parties, and capable of being ascertained with a reasonable degree of certainty. This requirement as to the certainty of damages recoverable is frequently said to exclude the idea of profits, but this statement must be understood to refer to the profits expected by reason of collateral engagements of the parties, or the profits of a going concern to arise from current sales and bargains which are yet to be made and dependent, to a great extent, on the uncertainty of trade and fluctuations of the market. Accordingly, it has been held that profits of an old established business may sometimes be allowed as damages, when they can be ascertained with a reasonable degree of certainty, and, under like circumstance, the prospective profits to arise from the contract declared on are also recoverable.

The doctrine is stated in Hale on Damages as follows: "In an action for damages, the plaintiff must prove, as part of his case, both the amount and the cause of his loss. Absolute certainty, however, is not required, but both the cause and the amount of the loss must be shown with reasonable certainty. Substantial damages may be recovered though plaintiff can only give his loss proximately." Hale on Damages, p. 70, quoted with approval by this Court in *Bowen v. Harriss,* 148 N. C. And further, on p. 71: "A difficulty arises, however, where compensation is claimed for prospective losses in the nature of gains prevented—but absolute certainty is not required. Compensation for prospective losses may be recovered when they are such, as in the ordinary course of things, are reasonably certain to ensue. Reasonable means reasonable probability. Where the losses claimed are contingent, speculative, or merely possible, they cannot be allowed." On this subject, the same author, pp. 72 and 73, quotes with approval from the opinion of *Selden, J.,* delivered in the case of *Griffin v. Colver,* 16 N. Y., 489, 491, as follows: "It is a well established rule of the common law that damages recoverable for a breach of contract must be shown with certainty, and not left to speculation or conjecture; and it is under this rule that profits are excluded from the estimate of damages in such cases, and not because there is anything in their nature which should *per se* prevent their allowance. Profits which would certainly have been realized but for the defendant's fault are recoverable; those which are speculative and contingent, are not. The broad general rule in such cases is that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject to but two conditions: The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed." And Sutherland on Damages, speaking on this subject, says: "It is not necessary that such damages shall be shown with mathematical accuracy." The same principle is well stated by Chief Justice Nelson in the notable case of *Masterton v. Mayor*, 7 Hill, p. 61, as follows: "When the books and cases speak of the profits anticipated from a good bargain as matters too remote and uncertain to be taken into the account in ascertaining the true measure of damages, they usually have reference to dependent and collateral engagements entered into on the faith and in expectation of the performance of the principal contract. The performance or non-performance of the latter may, and doubtless often does, exert a material influence upon the collateral enterprises of the party; and the same may be said as to his general affairs and business transactions. But the influence is altogether too remote and subtle to be reached by legal proof or judicial investigation. And, besides, the consequences, when injurious, are as often, perhaps, attributable to the indiscretion and fault of the party himself, as to the conduct of the delinquent contractor. His condition, in respect to the measure of damages, ought not to be worse for having failed in his engagement to a person whose affairs were embarrassed, than if it had been made with one in prosperous or affluent circumstances. Dom., b. 3, tit. 5, 2, Art. 4."

But profits or advantages which are the direct and immediate fruits of the contract entered into between the parties, stand upon a different footing. These are part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the contract was made, and formed, perhaps, the only inducement to the arrangement. The parties may indeed have entertained different opinions concerning the advantages of the bargain, each supposing and believing that he had the best of it; but this is mere matter of judgment going to the formation of the contract, for which each has shown himself willing to take the responsibility, and must, therefore, abide the hazard.

Such being the relative position of the contracting parties, it is difficult to comprehend why, in case one party has deprived the other of the gains or profits of the contract by refusing to perform it, this loss should not constitute a proper item in estimating the damages.

The doctrine so clearly defined and stated by these authorities, is approved and applied in decisions of our own Court, and well-considered cases in other jurisdiction. *Oldham v. Kerchner*, 79 N. C., 106; *Hinckley v. Steel Co.*, 121 U. S., 264; *Fail and Mills v. McRee*, 36 Ala., 61; *Nelson v. Morse*, 52 Wis., pp. 240-255; *Richmond & Jackson v. R. R.*, 40 Iowa, 264-277.

A proper application of these principles to the facts presented fully support the ruling of his Honor below, in submitting the question of prospective damages for the consideration of the jury, these facts affording all the data for an award of such damages with reasonable certainty. While we agree with his Honor that for breach of this contract, recovery for both present and prospective damages is permissible, we are of opinion that there was error to the plaintiff's prejudice in the rule by which a substantial portion of the damages was directed to be ascertained. On this question his Honor charged the jury, that in case a breach of contract was established, as claimed, the defendant was entitled to recover as damages the difference between the amount the plaintiff had agreed to pay for the work and the cost of performance. This was the entire statement of the trial Judge in reference to the rule by which the damages should be admeasured, and though somewhat general in its terms, is a correct rule as to all the damages which had been occasioned at the time of breach; but there was evidence offered tending to show that this contract would have required some years in its performance beyond the time when a breach was established, and, as to this prospective damage, that to arise in the time required for performance after such breach, the correct rule would be the present value of the difference between the contract price and the cost of performance. We hold, as stated, that recovery for this prospective damage can be had, but defendant is only entitled to the present value of his contract, and, in so far as such damage is allowed by anticipation, proper allowance should be made for the fact that present recovery is had for damage that would only have accrued at a future time. This position as to the correct rule for determining values to arise and accrue in the future, when a present recovery is allowable, is very well illustrated in the case of *Pickett v. R. R.,* 117 N. C., 616. In that case, and on the question indicated, it was held: "7. In an action for a negligent killing, an instruction that the expectation of one seventeen years old would be forty-four and two-tenth years, and that the measure of damages would be the net moneyed value of intestate's life to those dependent on him had he lived out his appointed time, is erroneous, because it leaves uncertain the date which should be the basis of the final calculation, instead of informing the jury that it is the present value of such net moneyed value which should be considered."

And while the authorities hold that one recovery is to be had for the entire damage, predicated on values as they existed at the time of the breach of the contract, and that it is error to admit testimony as to actual changes in the market values or the cost of labor and material that may arise after that date, see *Hawk v. Lumber Co., ante,* we deem it not amiss to say that competent witnesses who speak to this question, should always be sufficiently advertent to the fact that such fluctuations are not unlikely to occur, and Courts and juries should be careful to see that proper allowance is made on that account in fixing the amount of a present recovery, by reason of such damage.

Speaking to this question, and in support of the view that the principle referred to is of the substance and to be given its proper weight by the jury, *Nelson, Chief Justice*, in *Masterton's Case, supra,* said:

"The constituent elements of the cost should be ascertained from sound and reliable sources; from practical men, having experience in the particular department of labor to which the contract relates. It is a very easy matter to figure out large profits upon paper, but it will be found that these, in a great majority of the cases, become seriously reduced when subjected to the contingencies and hazards incident to actual performance. A jury should scrutinize with care and watchfulness any speculative or conjectural account of the cost of furnishing the article that would result in a very unequal bargain between the parties, by which the gains and benefits, or, in other words, the measure of damages against the defendants are unreasonably enhanced. They should not overlook the risks and contingencies which are almost inseperable from the execution of contracts like the one in question, and which increase the expense independently of the outlays in labor and capital."

Objection was further made that the defendant and other witnesses were allowed to give to the jury their opinion of the profits per thousand feet. These witnesses, or some of them, had given their statement and estimate of the cost per thousand feet to cut and haul and deliver these logs at a point where the tug-boat could get them, and the testimony objected to, while in the form of an opinion, was nothing but an estimate by them of the difference between the costs of performance and the contract price, making their testimony nothing really but an estimate of value, and thus bringing the same clearly within the general rule by which opinion evidence is available. Sedgwick Damages, sec. 1294.

But, apart from this, it will be noted that the witnesses who gave this testimony had personal observation and knowledge of the facts and conditions, and they were all said to be experienced lumbermen. Testimony of this kind, from such a source, is coming to be more and more allowed in investigations of this character, and the Courts are disposed to admit "opinion evidence" when the witnesses have had personal observation of the facts and conditions, and from their practical training and experience are in a condition to aid the jury to a correct conclusion. While not expert testimony in the strict sense of the word, it is coming to have a recognized place in the law of evidence.

McKelvey speaks of it as "expert testimony as to facts." McKelvey on Evidence, p. 230, and, in reference to it, this author says that it is nothing more than ordinary testimony as to facts given by witnesses specially qualified by observation and experience to give it. And, further, on p. 231: "There are two classes of witnesses who are ordinarily spoken of as experts. The one embraces those persons who, by reason of special opportunity for observation, are in a position to judge of the nature and effect of certain matters better than persons who have not had opportunity for like observation. For example, one who has had opportunity to observe the running of trains may testify as to the speed of an ordinary train. Such witnesses are really not experts in the strict sense of the term; they are only specially qualified witnesses. Any person, having been placed in the same position, and having had the same opportunity for observation, could give like testimony."

The testimony offered comes clearly within this principle, and its admission has been sanctioned by authoritative decisions here and elsewhere. *Britt v. R. R.*, 148 N. C.; *Taylor v. Security Co.*, 145 N. C., 385; *Sikes v. Paine*, 32 N. C., 280; *Eldridge v. Smith et al*, 95 Mass., 140; *Salvo v. Duncan et al*, 49 Wis., 151-157; *Stark v. Alford*, 49 Tex., 261.

The question of plaintiff's liability and the amount of recovery were submitted to the jury in one and the same issue, and for the error indicated in the opinion, a new trial is directed on the entire issue.

New trial.

W. J. RICE v. WILLIAM McADAMS et al.

(Filed 5 November, 1908).

1. **Procedure—Slander—Misjoinder of Defendants.**

   A joint action may not be maintained against two or more persons for slanderous words spoken, unless the defendants are connected by allegation and proof of a common design and purpose.

2. **Pleadings—Demurrer—Amendments—Acquiescence—Practice.**

   When the trial Judge sustains a demurrer to the complaint upon the grounds that two or more defendants were improperly joined in an action, to which plaintiff does not except, but obtains leave and amends the complaint to meet the views of the Court, he acquiesces in the judgment upon demurrer and will not be permitted to assign it for error upon an appeal. The better practice would be a request that the action be divided and tried separately.

3. **Pleadings—Amendments—Slander—Conspiracy Alleged—Theory of Trial—Instructions.**

   When, owing to an amendment of pleadings, the trial of slander against two defendants joined in the same suit is necessarily upon the theory of conspiracy, and no other, and the issues are not so framed, it is the duty of the trial Judge to try the case upon the amended pleadings, and it is not error for him to so instruct the jury under the issues that they may not be misled by their form.

ACTION for slander, tried before *Webb, J.*, and a jury, at March Term, 1908, of ORANGE.

These issues were submitted without exception:

1. Did the defendants falsely and maliciously speak of the plaintiff to Jacob Douglass the words set out in section two of the complaint, or words of same substance? Answer: No.

2. Did the defendants, in the home of Will Tate and John Tate, falsely and maliciously speak of the plaintiff the words

set out in section three of the complaint, or words of same substance? Answer: No.

3. Did defendants falsely and maliciously speak to Thomas Lynch concerning the plaintiff the words set out in section four of complaint, or words of same substance? Answer: No.

Plaintiff appealed. The facts are stated in the opinion of the Court, by *Brown, J.*

John W. Graham and *Paul C. Graham* for plaintiff.

Winston & Bryant and *S. M. Gattis* for defendant.

BROWN, J. 1. In the complaint as originally drawn, the plaintiff undertook to join these two defendants for uttering different slanderous words as to him. The defendants demurred *ore tenus* to the complaint upon the ground of a misjoinder.

We are not favored by plaintiff with any authority which, we think, sustain his contention that a joint action may be maintained against two or more persons for words spoken, unless the defendants are connected by allegation and proof of a common design and purpose. As a general rule, such an action cannot be maintained, for the words of one are not the words of the other. 25 Cyc., 434, and cases cited. But, however that may be, Judge Councill, then presiding, sustained the demurrer, and the plaintiff did not except, but sought and obtained leave to amend his complaint, and did amend it by interlining words, charging a conspiracy between the two defendants to jointly defame and slander the plaintiff.

It was upon this amended complaint, and the original answer denying the charge, that the case was tried.

If plaintiff was dissatisfied with the ruling he should have excepted and appealed. *Gattis v. Kilgo*, 125 N. C., 135. Or, better still, for an expeditious hearing, he could have asked the Court to divide the actions and try them separately. *Street v. Tuck*, 84 N. C., 605. Instead of doing either, the plaintiff acquiesced in the ruling of the Court and amended the complaint to accord with his Honor's views.

We take the law to be that where, after judgment upon demurrer, as in this case, the plaintiff does not except, but amends his complaint so as to meet the views of the Court, he acquiesces in the judgment upon the demurrer, and will not be allowed to assign it for error upon appeal. 2 Cyc., p. 645, and cases cited.

2. There are no exceptions to evidence, and the assignments of error relate to a part of the charge of his Honor as follows: "This is an action for slander, charging that the defendants combined and conspired to slander the plaintiff. The plaintiff contends that the defendants combined and conspired to utter the words set out in the complaint and to do him injury. The defendants contended that there was no conspiracy, no combination, no malice, no understanding to utter the words complained of. The burden was on the plaintiff to show a conspiracy; to show that malice would be presumed from the use of the words set out in the complaint, and the burden of justifying the charges or showing that they were true would be upon the defendant. Unless the jury was satisfied by the greater weight of the evidence of a conspiracy or combination formed and entered into by the defendants to speak the words set out in the complaint and to charge the plaintiff with larceny of wheat, then the jury will answer the first three issues 'No,' and need not consider the fourth issue, as this would be the end of the case." We find no error in this instruction.

It is true the issues were not framed upon the theory of a conspiracy, but the case was tried upon that theory, and no other, and properly so in deference to the previous ruling of Judge Councill.

It became the duty of Judge Webb to try the case upon the amended pleadings, as he did, and to instruct the jury, as he did, so they would not be misled by the form in which the issues were drawn.

Upon a review of the entire record we find

No error.

D. E. TEAL et al v. R. A. TEMPLETON.

(Filed 5 November, 1908).

1 **Jurisdiction—Justices of the Peace—Contract—Amount Involved.**

The test of the jurisdiction of a Justice of the Peace is the sum demanded in the summons, and when the sum so demanded in a suit upon contract does not exceed $200, he has jurisdiction, though it may appear on the Justice's docket that a greater sum could have been demanded on the facts alleged.

2. **Same—Appeal—Remitter.**

When, on appeal to the Superior Court from a judgment of a court of a Justice of the Peace, the amount involved is doubtful, it may be made clear by a remitter sufficient to confer jurisdiction, even if the remitter is retroactive.

3. **Justice of the Peace—Practice—Pleadings.**

Judgment upon a counterclaim set up in an action in a court of a Justice of the Peace cannot be had on the ground that no reply was filed thereto, as the pleadings are oral in that court.

4. **Same—Appeal—Discretion of Court.**

The trial on appeal in the Superior Court from a Justice's judgment is *de novo*, and the Judge may, in his discretion, allow pleadings to be filed.

5. **Evidence—Motions—Nonsuit—Waiver.**

A motion as of nonsuit upon the evidence, made at the close of plaintiff's evidence and not renewed at the close of all the evidence, is waived.

6. **Contracts—Timber Interests—Writing — Jurisdiction — Justice's Court.**

A contract of lease for three years or less need not be in writing. Title to land is not drawn into controversy, and a Justice's court has jurisdiction.

7. **Statute of Frauds—Pleadings.**

When the statute of frauds is relied upon in defense, it must be pleaded, to be available.

ACTION tried before *Jones, J.,* and a jury, March Term, 1908, of ANSON.

ACTION begun before a Justice of the Peace. The sum demanded in the warrant is "$200 due by breach of contract for rent of farm and sale of timber." There was no written complaint, but on the Justice's docket the cause of action was stated, "Plaintiff complains that in October, 1905, he rented his farm to defendant for the year 1906 for $250, and sold him a lot of timber to cut on certain land, the defendant to cut all trees that would measure 8 inches at the stump at 22 1-2 cents per tree, and that the defendant had broken said contract." The defendant denied the contract of renting, pleaded counterclaim for over-payment as to trees, and demurred to the jurisdiction. The Justice gave judgment for plaintiff. On appeal, in the Superior Court, the defendant moved to dismiss for want of jurisdiction. The plaintiff stated that he had at no time demanded in excess of $200, and as further precaution entered a remitter of all above that sum. His evidence showed a renting of land to defendant for $250, breach of contract, and plaintiff renting to another for $150. The jury found this to be so and gave the plaintiff verdict for $100. It also found that the defendant had broken the contract as to cutting the timber, but that there was nothing due the plaintiff on that above what he had paid. Judgment. Appeal by defendant.

Robinson & Caudle and *J. W. Gulledge* for plaintiff.
McLendon & Thomas for defendant.

CLARK, C. J. The objection to jurisdiction was properly overruled. There being no written complaint, the "sum demanded" in the summons is the test. Both causes of action were for breach of contract and the total sum demanded was $200. The Justice therefore had jurisdiction. *Cromer v.*

Marsha, 122 N. C., 563; *McPhail v. Johnson,* 115 N. C., 302; Rev., 1419, 1445.

Had it been doubtful as to the sum demanded, the remitter made it clear, even if it had been retroactive. *McPhail v. Johnson*, 115 N. C., 302, and cases there cited; *Brantley v. Finch,* 97 N. C., 91. But it is clear the plaintiff was suing for breach of contract and not for the $250 due for rent, if contract had not been broken.

The defendant was not entitled to judgment for the counterclaim filed in the Justice's court on the ground that no reply had been there filed, for the pleadings were oral and, besides, the trial in the Superior Court was *de novo,* and the Judge in his discretion allowed a reply to be filed. There was no ground for motion to nonsuit. Besides, the defendant waived it by introducing evidence, and not renewing motion at the close of all evidence.

The exception that the contract was not in writing cannot avail. A lease for three years or less is not required to be in writing. The statute of frauds was not pleaded. Besides, the defendant could not take the timber and refuse to pay for it. But if the statute of frauds were pleaded, it would not necessarily have affected the jurisdiction of Justice of the Peace, for "title to land" was not drawn in controversy. There was no recovery on this cause of action.

Both parties testified that it was agreed that the contract should be reduced to writing, but failure to do so did not invalidate the contract. It only affected the mode of proving the contract. In fact, it was put in writing, but the defendant refused to sign it. No exception was taken on the trial to proving value of the timber in excess of 22 1-2 cents per tree. Had this been done, the Judge would doubtless have allowed plaintiff to amend his allegation.

No error.

GEORGE McCLINTOCK v. LIFE INSURANCE COMPANY OF VIRGINIA.

(Filed 5 November, 1908).

1. **Appeal and Error—Justice's Court—Appeal Dismissed in Superior Court, Effect of—Procedure.**
   The dismissal of an appeal from a court of a Justice of the Peace, when not docketed by the appellant at the term of the Superior Court prescribed by Revisal, sec. 608, has the same effect as an affirmation of a judgment thereof under sec. 607, Revisal.

2. **Appeal and Error—Justice's Court—Motion to Dismiss—Laches—Discretion—Procedure.**
   The action of the lower Court is not reviewable in allowing the motion of the appellee, from a judgment rendered in a court of the Justice of the Peace, to docket and dismiss an appeal when the appellant had neither paid the Clerk's fees nor requested him to docket the appeal.

ACTION heard by *Webb, J.*, at June Term, 1908, of GUILFORD. Defendant appealed.

Judgment was taken before a Justice of the Peace 8 September, 1906. An appeal was taken in open court and the transcript on appeal was promptly sent to the Clerk of the Superior Court. At August Term, 1907, the appeal not having been docketed (though in the interim five terms of the Superior Court had been held), the appellee moved to docket and dismiss. This motion was continued from term to term till January Term, 1908, when it was allowed. At no time prior to August Term, 1907, did the appellant ask to docket the appeal, or for a *recordari.*

Scott & McLean for plaintiff.

King & Kimball and *Stedman & Cooke* for defendant.

CLARK, C. J. Revisal, sec. 607, provides, "If the appellant shall fail to have his appeal docketed as required by law, the appellee may, at the term of said court next succeeding the term to which the appeal is taken, have the case placed upon the docket, and upon motion, the judgment of the Justice shall be affirmed." The dismissal of the appeal had the same effect. Revisal, sec. 608, required this appeal to be docketed "at the ensuing term" of the appellate court, if more than ten days after judgment. *Pants Co. v. Smith,* 125 N. C., 588.

It is true, the Judge finds that the Clerk was in the custom of docketing such appeals without requiring payment of fees, that the Clerk was in bad health and the docket was crowded. For these reasons, the Judge in his discretion, might (if the delay in docketing was not too gross) have allowed a motion to docket *nunc pro tunc*. *Marsh v. Cohen,* 68 N. C., 283; *West v. Reynolds,* 94 N. C., 333. Here, the appellant neither paid the Clerk's fees, nor requested him to docket the appeal, nor paid any attention to it for eleven months, during which time there were five terms of the Superior Court. If it were conceded that, after such *laches*, the Judge could, in his discretion, have allowed the appeal to be docketed, it is clear that his refusal to do so is not reviewable. This has been held lately by *Brown, J.,* in *Lentz v. Hinson,* 146 N. C., 31, and by *Walker, J.,* in *Blair v. Coakley,* 136 N. C., 409, citing many cases. In *Johnson v. Andrews,* 132 N. C., 376 (relied on by appellant), the fees were paid to the Clerk, and he was requested to docket the appeal, and the Clerk later informed the appellant that he had done so.

As this Court has often stated, "if a person has a case in court the best thing he can do is to attend to it." *Pepper v. Clegg,* 132 N. C., 316.

Affirmed.

H. T. RICH and Wife v. J. K. MORISEY, Executor, et al.

(Filed 5 November, 1908).

Defendants' Appeal.

1. **Issues—Questions of Fact—Equity Jurisprudence—Facts Established.**
While issuable facts, as distinguished from those which are evidentiary, must ordinarily be found by a jury, when the equity jurisdiction of the Court has been invoked, the Court will not grant a new trial when it appears that all of the essential facts upon which the rights of the parties depend are established by the pleadings or have been found by the jury.

2. **Suits—Forma Pauperis—Application Denied, Afterwards Granted.**
An exception to the refusal of the trial Judge to dismiss an action, brought in forma pauperis, for that theretofore another action for the same cause had been dismissed by another Judge, under Revisal, 451, and no appeal taken, cannot be sustained.

3. **Mortgagor and Mortgagee—Executors and Administrators—Purchaser at His Own Sale—Estoppel of Devisee and Heir—Ratification—Questions for Jury.**
A mortgaged land to B, who, upon A's death, qualified as his administrator. B sold the land pursuant to the power contained in the mortgage and procured C to buy it. C executed a deed to B, who charged himself, in his final account, as administrator, with the amount of the bid made by C. B devised to D, the heir of A, a portion of the land, who, during infancy and while under coverture, entered upon the land devised to her. Thereafter she brought this action, treating the sale under the mortgage as void and offered to redeem. *Held*, (1) That the sale was voidable at the election of the heir of A. (2) That taking possession of the land devised to D did not, as a matter of law, make an election, estopping her from the enforcement of her legal or equitable rights. (3) Whether her conduct amounted to a ratification was, in the light of the evidence, a question for the jury. His Honor's instructions upon the issue approved.

4. **Limitations of Actions—Issues—Assignment of Error.**
When no issue as to the statute of limitations was tendered or requested in apt time, it cannot be assigned as error, after verdict, that no such issue was submitted.

CIVIL ACTION tried before *W. R. Allen, J.*, and a jury, December Special Term, 1907, of SAMPSON.

The facts disclosed by the pleadings and verdict of the jury are: O. B. Morisey, the ancestor of *feme* plaintiff, being the owner of the tract of land in controversy, containing 140 acres, on 3 December, 1874, executed a mortgage thereon to D. G. Morisey to secure the payment of a note for $627. During the year 1883 said O. B. Morisey died intestate, leaving the *feme* plaintiff, an infant, his only heir at law. D. G. Morisey duly qualified as his administrator and sold the personalty for the sum of $151, of which he made due return to the Clerk of the Superior Court. During the month of February, 1884, said D. G. Morisey, pursuant to the power of sale in said mortgage, sold the land at public auction for $1,500. At the sale, one A. F. Johnson bid in the land, but no deed from said Morisey to Johnson appears of record. He bought for, and at the request of, said D. G. Morisey and paid no money on account of his bid. A. F. Johnson conveyed to D. G. Morisey, who went into possession of said land and remained therein until his death, during the year 1901. On 19 March, 1901, said D. G. Morisey, as administrator of O. B. Morisey, filed in the Clerk's office his final account, wherein he charged himself with the sum of $151, proceeds sale of the personalty, and $1,500, proceeds sale of the land. He credited himself with the mortgage debt and the sum of $614.97, "amount retained on account." The debit and credit items, including interest and expenses of administration, left in his hands $12.11, which he retained as commissions. The account was duly verified before the Clerk. The *feme* plaintiff was married to her co-plaintiff 3 November, 1898, before arriving at full age. D. G. Morisey died on the . . day of . . . ., 1901, having first made and published his last will and testament appointing defendant James K. Morisey executor thereto. In his said will, D. G. Morisey devised to *feme* plaintiff, Penny O. Rich, the portion of the land in controversy, upon which her father lived, containing 50 acres, and fifty dollars in money. The remaining ninety (90) acres of land were devised to his nieces, the defendants Walker Morisey and Annie Hubbard. The will was read to all the devisees including the plaintiffs. In a short time thereafter, 1 January, 1902, the fifty acres devised to *feme* plaintiff was surveyed by direction of the executor and with the assent of plaintiff, and she, with her husband, took possession thereof and has remained in possession thereof to the time of the trial. The devisees other than plaintiff sold and conveyed the land so devised to them, subsequent to October, 1905, to defendant John B. Moore for full value. Upon issues submitted to them, the jury find that defendant Moore was a purchaser for value and without notice of any debt due by D. G. Morisey; that he was not a purchaser without notice of plaintiff's "claims"; that the value of the land, at the time of the sale under the mortgage, was $1,500; that plaintiffs have not ratified and affirmed the mortgage sale; that the value of the personal estate of said O. B. Morisey was as shown by the record ($151); that the annual rental value of the land, from the time D. G. Morisey took possession until his death, was $125; that the annual rental value, after cutting off the fifty acres devised to *feme* plaintiff, is $50. His Honor, upon the foregoing findings, directed the jury to answer the issue, in regard to the right of plaintiffs to redeem, in the affirmative. A number of exceptions were lodged by plaintiffs and defendants to the issues submitted, and to the refusal to submit others tendered. No issues were tendered regarding the statute of limitations. Upon the verdict plaintiffs and defendants tendered judgments, each of which his Honor declined to sign. He signed the judgment set out in the record, reciting the verdict upon the issues and such other facts as were not controverted, which are hereinbefore set out. He thereupon rendered the following judgment:

1. That the plaintiff is entitled to redeem said land.

2. That the final account of said administrator, until impeached, is *prima facie* correct.

3. That said land being charged in said final account at the sum of $1,500, and the same being used in the payment of debts of the said O. B. Morisey, and to that extent having exonerated the interest of the plaintiff in the lands in controversy from the payment of debts, the plaintiff upon the statement of the account between her and the defendants, is chargeable with said sum of $1,500 as of 27 February, 1884, and that the rents and profits as found by the jury should be applied thereto. It is thereupon considered and adjudged that the defendant J. B. Moore holds the title to said land in trust for the plaintiff Penny O. Rich, and, upon the payment of the sum of $164.13, the balance after applying the rents to said sum of $1,500 by the said Penny O. Rich, with interest from 9 December, 1907, that he convey the same to her in fee.

It is further considered and adjudged, that upon failure of the said Penny O. Rich to pay said sum of $164.13, with interest from 9 December, 1907, within ninety days, the Clerk of the Superior Court of Sampson County, W. F. Sessoms, who is now appointed a commissioner for that purpose, sell said land at public outcry, at the court-house door in Clinton, after due advertisement, for the payment of said sum, and that he report his proceedings to this Court.

It is further considered and adjudged that the plaintiffs recover of the defendants their costs.

Both parties excepted and appealed.

J. D. Kerr for plaintiffs.

Faison & Wright, H. A. Grady and *F. R. Cooper* for defendants.

DEFENDANTS' APPEAL.

CONNOR, J., after stating the case: Before proceeding to discuss the exceptions directed to the merits of the case, it is proper to say that, in our opinion, the issues submitted by his Honor present every phase of the controversy proper to be passed upon by the jury. While it is true that, in regard to some of the issues, there are no specific allegations in the pleadings, yet it is obvious that no decree adjusting the rights of the parties could have been rendered until the Court was informed, either by the findings of the jury, or upon the report of a Referee, in regard to the matters involved in such issues. Under the system of procedure which prevailed with us prior to the adoption of the Code, the plaintiffs would have sought relief by a bill in equity. While it is true that every issuable controverted fact, as distinguished from mere evidentiary facts, must be found by the jury upon appropriate issues, it is equally true, to a large extent, that the form of the issues is within the sound judicial discretion of the Court. *Emry v. R. R.,* 102 N. C., 209; *Springer v. Sharender,* 116 N. C., 12; *Paper Co. v. Chronicle Co.,* 115 N. C., 676.

When it is manifest that all of the essential facts, upon which the rights of the parties depend, appear upon the pleadings or have been found by the jury, this Court will not, upon a mere question of form, set aside the judgment and subject the parties to a new trial involving delay and expense. In questions of procedure, errors, if found to exist, must appear to be prejudicial to appellant to entitle him to a new trial. It is evident that his Honor grasped the scope of the litigation and has, by the verdict of the jury, together with the admissions in the pleadings, rendered a decree which puts an end to the litigation in regard to matters and transactions which occurred twenty-four years ago. Two nonsuits have been taken. Delays have been had during which transactions and the character of men who have passed away are attacked. A purchaser for full value from the devisees of D. G. Morisey, more than two years after his death and after the present plaintiffs by acquiescence and acceptance of a devise of a portion of the same land, and after two judgments of nonsuit had been rendered, finds his title brought into litigation.

It will be convenient to discuss the defendant's appeal first. It appears that plaintiffs instituted an action in *forma pauperis* based upon the same allegations and asking the same relief to the Spring Term, 1902, of the Superior Court of Sampson. Defendants, upon affidavit, moved to "dispauper" them, whereupon they submitted to a judgment of nonsuit at October Term, 1902. They brought a second action within a year and, at October Term, 1905, upon the motion of defendants for the same reason the Court dismissed the action, from which no appeal was taken. On 6 July, 1906, they brought this action in *forma pauperis.* Defendants moved, before Judge Jones, to dismiss for that it appeared that the *feme* plaintiff owned fifty acres of land worth more than $200; that the second action was brought more than a year after the first nonsuit; that plaintiffs were estopped by the order dismissing the action, at October Term, 1905, by which they were "dispaupered." Upon this motion, Judge Jones found that plaintiffs were not able to give a prosecution bond and refused to dismiss. They rely upon section 451, Revisal. This section permits a party to sue in *forma pauperis* by showing to the judge or clerk that he has a good cause of action and makes affidavit that he is unable to give the bond or make the deposit required by section 450. It differs from section 454, which requires the defendant, before answering without filing defense bond, to make affidavit "that he is not worth the amount of said undertaking, in any property whatsoever, and is unable to give the bond." While the dismissal of the action by one judge does not estop plaintiff from bringing a second action, the fact of such dismissal should be considered by the clerk or judge and given due weight when the party makes the second application. To permit repeated actions to be brought, under section 451, to the annoyance and expense of parties, hindering them in the enjoyment and sale of property, would be an abuse of a privilege which the law confers upon poor persons acting in good faith. It is very easy to obtain the certificate of counsel who hear but one side of the case, in the not unnatural coloring of the party desiring to sue. The exception to the refusal of Judge Jones to dismiss the action cannot be sustained. The action of the Judge who dismissed at a former term was not a judgment upon the merits and therefore was not *res judicata* in respect to a second application to sue.

The defendants except to the refusal of his Honor to submit an issue, tendered by them, enquiring whether *feme* plaintiff accepted the fifty acres of land and went into possession thereof under the will of D. G. Morisey, before the commencement of this action. The defendants insist that if this issue was answered affirmatively, the *feme* plaintiff would be thereby estopped; that she would not be permitted to take the fifty acres under the will and claim the right to redeem the entire tract, as heir of her father. His Honor submitted an issue pointed to the question of ratification of the attempted sale under the mortgage, which covers the contention of defendants. He instructed the jury that the only evidence of a ratification was that of her conduct, in respect to the fifty acres. That to constitute a ratification, the acts relied upon must have been done with a knowledge of the facts—that is, of the attempted sale, etc. He further instructed them, that if she knew of the mortgage and the sale thereunder and that D. G. Morisey had given her the fifty acres of land in his will, and with a knowledge of these facts she entered upon and accepted the land under said will, this contract, on her part, would be a ratification. To this instruction defendants excepted. The issue presented and, in the light of the instruction, the jury passed upon the question of her acceptance of the devise. We think the instruction correct.

We do not find in the testimony sent up any evidence that the *feme* plaintiff had any knowledge or information respecting the sale by D. G. Morisey and the conveyance to him by Johnson. She was a small child when her father died and when the sale took place. It may well be that she knew that her uncle had a mortgage on the land and that he had taken possession of it. However this may be, the question was left to the jury in as favorable light as defendants were entitled to, and they have found for her. His Honor could not, as a matter of law, have held that she had elected and ratified a void or voidable sale, thereby foreclosing her right to redeem.

It is suggested that she was put to her election to accept the fifty acres and thereby surrender her right to redeem the entire tract, or to reject the devise and assert her claim. The equitable doctrine of election between inconsistent benefits is well settled by numerous decisions of this Court and all works on equity jurisprudence. It applies when a testator attempts to devise the property of A to B and, at the same time, gives his own property to A. If both the elements do not combine, the doctrine is not invoked or, as it is said, there is no case for an election. Bispham Eq., 298. It is very doubtful whether the facts before us present a case in which the plaintiff, if *sui juris*, is put to her election. Morisey owned as mortgagee the entire tract and plaintiff, as heir of her father, was entitled to redeem. The devisor held the legal title to the whole and the plaintiff had the equity of redemption in the same property. These facts do not bring the case within the doctrine. Again, the plaintiff was a *feme* covert, and before being put to her election was entitled to have a full disclosure of the value of the property and of her right to redemption, to the end that she might have a full opportunity to exercise her election, if required to make one before suing, and to act advisedly. The general rule is, that "to estop a married woman from alleging a claim to land, there must be some positive act of fraud, or something done upon which a person dealing with her, or in a matter affecting her rights, might reasonably rely, and upon which he did rely and was thereby injured." *Towles v. Fisher,* 77 N. C., 437; *Weathersby v. Farrar,* 97 N. C., 106; *Wells v. Batts,* 112 N. C., 283. It was certainly not fraudulent as against the other devisees for plaintiff to enter upon the fifty acres. They had, so far as the record shows, the same knowledge regarding the condition of the title as she did. They took under the will of D. G. Morisey and are not purchasers for value. It cannot be seen how they were misled or parted with anything of value, or surrendered any right, by reason of her conduct. In regard to defendant John B. Moore, he purchased after the nonsuit. This should have put him upon inquiry as to her claim, and the jury find that he was not a purchaser for value without notice thereof. The exception of defendants to his Honor's ruling, in this respect, cannot be sustained.

The defendants except to his Honor's refusal to permit them to show that O. B. Morisey was insolvent at the time of his death. We see no error in this. It was not relevant to, and could not affect the verdict upon any issue, besides, with the final account of the administrator in evidence, unimpeached, insolvency was clearly shown.

Exception is taken because his Honor failed to submit any issue upon the statute of limitations. It is sufficient to say that, as no such issue was tendered, and the Court not requested to submit one, it is too late after verdict to assign the failure to do so as error. Clark's Code, sec. 395, where the cases are collected sustaining his Honor. No statute is pleaded except by defendant John B. Moore, who relies upon the statute protecting a purchaser from the heir or devisee, two years after the death of the ancestor or devisor, without notice of the indebtedness. This statute has no application here. The plaintiff is not seeking to enforce the collection of a debt from the executor of Morisey. The jury find that defendant Moore had no notice of any debt against Morisey, hence that question, in any point of view, is eliminated.

His Honor, upon the finding of the jury and the pleadings, held that the *feme* plaintiff was entitled to redeem and so instructed the jury, or so answered the issue himself. Defendants excepted. It is well settled, both upon principle and uniform authority, with us, that a mortgagee cannot foreclose the equity of redemption by a sale of the property under the power and a purchase by himself. Such sale and attempted purchase is void or voidable at the election of the mortgagor. The mortgagee, in respect to the exercise of the power of sale, is a trustee, and the well settled rule which prohibits a trustee from purchasing the property conveyed to, or held by him in trust, from acquiring title as against the *cestui que trust*, has been uniformly applied. In *Fronerberger v. Lewis,* 79 N. C., 426, Judge Bynum reviews the decision of this Court, showing that they are uniform in this respect. In *Jones v. Pullen,* 115 N. C., 465, *Shepherd, C. J.,* says: "There is no question, according to our authorities, that if a mortgagee with power to sell indirectly purchases at his own sale, the mortgagor may elect to avoid the sale, and this without reference to its having been fairly made, and for a reasonable price. This is an inflexible rule, and it is not because there is, but because there may be, fraud." His Honor's ruling, in this respect, is in conformity with the uniform decisions of this Court and the well settled principles of equity. We reserve the exception to the refusal of his Honor to sign the judgment tendered by defendants until we have examined them and have disposed of the exceptions lodged by plaintiffs.

PLAINTIFFS' APPEAL.

1. **Mortgagor and Mortgagee—Voidable Sale—Executors and Administrators—Heirs—Land Chargeable with Debts of Deceased—Accounting.**

When the heir of the mortgagor asks the Court to set aside a voidable sale and permit her to redeem, she is correctly charged, upon an accounting, with the debts of her ancestor, the mortgagee, for which the land, in her hands could have been subjected. The principle upon which the accounting was had in this case is approved. The statute of limitations was not involved.

3. **Executors and Administrators—Evidence—Final Account—Prima Facie Correct.**

In a suit involving the transactions of an administrator, his verified final account, examined, endorsed and filed by the Clerk is *prima facie* evidence of its correctness.

4. **Mortgagor and Mortgagee — Sale under Mortgage Set Aside—Heir—Purchase Price.**

In setting aside a deed to the mortgagee of lands indirectly purchased by him at his own sale, under a power in the mortgage, the Court will require the heir claiming under the mortgagor to account for the purchase price, which has been applied to the payment of her ancestor's debts.

CONNOR, J. The plaintiff introduced the final account of D. G. Morisey, administrator of O. B. Morisey, deceased, filed 19 March, 1901, by which it appears that he charged himself with proceeds of sale of personalty $150, and proceeds of sale of land $1,500. He credits himself with the mortgage debt and "amount retained on account" $614.97, Clerk's fees and amount paid attorneys $20, leaving a balance of $12.11 which he retains as commissions. No evidence was introduced tending to impeach the account. His Honor, having adjudged that the *feme* plaintiff was entitled to redeem, may have ordered a reference to ascertain the status of the account between D. G. Morisey's estate and plaintiff, or, as he did, ascertain the facts from the pleadings and issues or questions submitted to the jury. The principle upon which the adjustment of the account was to be stated was correctly adopted by his Honor. Plaintiff was required to pay the indebtedness of her father for which the land was liable, subject to a reduction of the rents and profits, for which the mortgagee in possession was liable.

Plaintiffs have filed a large number of assignments of error. Many of them are technical and do not affect the merits of the case or the rights of the parties. The amount of the mortgage debt is fixed, and the jury have fixed the amount of the annual rents to the time of D. G. Morisey's death and subsequent thereto. To this extent there is no complication.

It is true that a mortgagee has no right to tack an unsecured debt to the mortgage debt and demand payment of both as a condition to redemption. In this case, upon the death of O. B. Morisey, his heir has a right to redeem by paying the mortgage debt. Immediately upon his doing so, the land was liable to be sold by the administrator to make assets to pay any other indebtedness subject, of course, to the widow's dower and the homestead rights of the infant children. These are eliminated because the widow is dead and the plaintiff is now of full age. While the *feme* plaintiff elects to repudiate the sale and claims the right to redeem the land, she must do equity by paying such debts as her ancestor would have been bound for, to which the land could have been subjected.

His Honor correctly held that, in the absence of any impeachment, the duly verified final account of D. G. Morisey, administrator, was to be treated as correct. In *Allen v. Royster,* 107 N. C., 278 (p. 283), *Davis, J.,* says: "The statute makes such account, thus examined, endorsed and filed in the office of the Clerk of the Court, *prima facie* evidence of its correctness." It shifts the burden of proof, as to the correctness of what it contained, to him who alleged the contrary. In *Collins v. Smith,* 109 N. C., 468, the same Justice says: "There is no allegation of any fraud or mistake in the final account so audited, nor is it attacked in any way by plaintiff and it is, at least, *prima facie* correct." *Coggins v. Flythe,* 113 N. C., 103. This being so, his Honor adopted the amount charged by the administrator as proceeds of the land, which was found by the jury to be its full value. He credits him with the mortgage debt and the account which he held against his brother, O. B. Morisey. Unless this course is pursued the plaintiff will recover the land free from the amount due by account, and, in addition, the rents and profits from 1884 to 1901 at $125 annually, and since 1901 to the present at $50, she having received the rents from the 50 acres devised to her. Upon this recovery, the executor, J. K. Morisey, would be entitled to bring suit on the account and, upon recovering judgment, have the land subjected to the payment thereof. In that suit the plaintiff, or the personal representative of O. B. Morisey, would be entitled to have rents of the land credited on the account, all of which would, after long and expensive litigation, bring the parties to the same result reached by his Honor. We do not find any evidence of actual fraud on the part of D. G. Morisey. He paid off a debt which was a lien on his brother's land in 1874 and indulged him until his death, 1883. In the meantime, he credits his brother on account to the amount of $614. He buys the land at its full value and at his death gives to his brother's only child evidently the most valuable part of it, and a small pecuniary legacy. The plaintiff could not be permitted to plead the statute of limitations against the account. *Costen v. McDowell,* 107 N. C., 546. The plaintiff asks the equitable aid of the Court and is given the land with rents for twenty-eight years. The loss falls upon innocent persons who have purchased the land for full value. She is required to pay the honest debts of her father, etc. To decree her the land and rents without this condition would be inequitable and unjust. This Court has uniformly held that while it will, in such cases, set aside the sale, it will require the party, in whose behalf the equity is enforced, to account for the purchase money, at least to the extent that the land has been exonerated from the claims upon it. *Card v. Finch,* 142 N. C., 140. In *Scott v. Dunn,* 21 N. C., 425, the executor, under a mistake in regard to his power, sold the land of his testator; the sale was set aside at the suit of the devisee. The purchase money had been applied to the payment of debts of the testator. It was held that the purchaser was subrogated to the rights of the creditor and the amount paid on the debts must be accounted for. *Gaston, J.,* after declaring the equity, says: "As all parties are before the Court, complete justice may be done by deciding direct relief to the plaintiff. . . . The doctrine of substitution, which prevails in equity, is not founded on contract but, as we have seen, on the principles of natural justice. Unquestionably the devisees are not to be injured by the mistake of the executor, as to the extent of his power over the land; but that mistake should not give them unfair gains. The executor was not an officious intermeddler in paying off the debts of his testator; and his erroneous belief that he could indemnify himself in a particular way, should not bar him from obtaining indemnity by legitimate means. It is not a question here, whether a mistake of law shall confer any rights, but whether such mistake shall be visited with a forfeiture of rights, wholly independent of that mitsake." *Perry v. Adams,* 98 N. C., 167.

His Honor, having all the parties before him, has adjusted their rights upon fair equitable principles all in conformity to the decisions of this Court. We are also of the opinion that the principle upon which the rents were applied is correct. After a careful examination of the record in both appeals, we find no error in the judgment. The *feme* plaintiff gets a tract of land upon the payment of $164, upon which her father permitted a mortgage for $627 to stand for ten years, paying no interest and contracting an account for $614. We do not find any evidence of actual fraud on the part of

D. G. Moriesy. By his mistake as to his right to buy the land he has discharged it practically from indebtedness, and his niece, to whom he gave fifty acres, "comes to her own," while the defendant Moore sustains the loss. Neither party will recover amount paid for printing. The judgment in both appeals must be

Affirmed.

GEORGE HOUSER, by his next friend, LIZZIE OAKES, v. W. R. BONSAL & COMPANY.

(Filed 5 November, 1908).

1. **Jurisdiction Concurrent—Justice of the Peace—Torts—Demand Limited.**

   Under our Constitution and statute, jurisdiction is conferred upon a Justice of the Peace concurrent with that of the Superior Court of all actions of tort wherein the plaintiff, in good faith, states or limits his demand at fifty dollars, or less.

2. **Jurisdiction—Justice of the Peace—Infant Parties—Appointment of Next Friend.**

   There being no statutory special method indicated by which a next friend may be appointed to represent an infant in an action properly brought in a Justice's court, Revisal, secs. 405, 1473, the rule prescribed by the Supreme Court, Revisal, sec. 1541, applies, and thereunder the appointment should be made by the Justice of the Peace, using the same care and circumspection in investigating the fitness of the person to be appointed as is required by the Clerk, in actions properly brought in the Superior Court.

3. **Judgments—Justice of the Peace—Infant Parties—Guardian ad Litem—Appointment of—Procedure—Irregularity—Ratification.**

   A judgment rendered by a Justice of the Peace in favor of an infant plaintiff, and paid, will not be set aside by direct proceedings, between the same parties for the same cause of action, solely upon the ground that the next friend of the infant in the suit was appointed by the Clerk of the Court. At most, the action of the Clerk would be but an irregularity, which the Justice of the Peace may subsequently ratify by the subsequent proceedings.

4. **Superior Court—Justice's Judgments—Plea in Bar—Fraud—Direct Proceedings.**

When, in an action in the Superior Court, the defense is set up that judgment had been entered in the court of a Justice of the Peace, and paid, and in reply the plaintiff assails the judgment on the ground that the action was instituted and the judgment procured by fraud, and with the purpose of depriving the plaintiff of his just demands, the suit in the Superior Court is a proper course to declare the entire proceedings in the Justice's court a nullity, and obtain the relief sought, all the parties in interest being before the Court.

5. **Same—Jurisdiction—Relief in One Action.**

Under our present system, where Courts are empowered to administer full relief in one and the same action, when a judgment of a Justice of the Peace has been set up in bar of plaintiff's demand, and plaintiff has replied, according to the course and practice of the courts, alleging that the judgment was procured by fraud, and all parties to be affected by the decree are before the Court, the action should be considered and held a direct proceeding to assail the judgment, notwithstanding other issues are involved.

ACTION to recover damages for personal injuries to plaintiff, caused by alleged negligence on part of defendants, tried before *Jones, J.*, and a jury, June Term, 1908, of ANSON.

Plaintiff filed his complaint and alleged that plaintiff had been injured by the wrongful negligence of the defendants to his damage $5,000. Defendants answered denying negligence on their part, alleging that the damage suffered, if any, was nowhere near the amount alleged. Defendants further answered and averred that plaintiff, by his next friend, Robert Houser, who was father of plaintiff, had instituted an action to recover damages for the alleged wrong and injury, before one W. F. Long, a Justice of the Peace, in the county of Richmond, having jurisdiction of the claim, the amount demanded having been stated at $50.00; and that recovery for said sum was had in that action against the defendants, and same had been paid, and defendants pleaded said judgment in bar of any other or further recovery for the same wrong and injury.

Plaintiff replied and averred that said judgment, had before the Justice of the Peace, was void:

1. For that plaintiff being a minor, Robert Houser appearing in that action as next friend of plaintiff had been appointed to the office for that suit, by the Clerk of the Superior Court, and not by the Justice who tried the cause.

2. Because said judgment was obtained and procured by fraud.

On the hearing, the Judge dismissed plaintiff's action, holding—

1st. That the Justice of the Peace had jurisdiction of the cause in which the judgment had been entered by him.

2nd. That the judgment of said Justice, as it then stood, was a bar to any other and further recovery by plaintiff.

3rd. That same could only be assailed or impeached by direct proceeding instituted for the purpose.

The plaintiff excepted and appealed.

J. W. Gulledge and *W. E. Brock* for plaintiff.
Morrison & Whitlock for defendants.

HOKE, J., after stating the case: In *Duckworth v. Mull*, 143 N. C., 461, it was held: that the clause in the Constitution which provided that "the General Assembly may give to Justices of the Peace jurisdiction of other civil actions, wherein the value of the property in controversy does not exceed fifty dollars"; and the statute, giving jurisdiction to Justices of the Peace in like terms, operates to confer upon said Justices jurisdiction concurrent with that of the Superior Court of all actions of tort, wherein the amount demanded in good faith for plaintiff's injury did not exceed the sum of fifty dollars, the Court in that case, construing the words "property in controversy" as meaning "the value of the injury complained of, and involved in the litigation." And the opinion further decides, that where a plaintiff, in good faith, states or limits his demand in actions of that character, at fifty dollars or less, the Justice has such concurrent jurisdiction, citing with approval *Malloy v. Fayetteville*, 122 N. C., 480; *Watson v. Farmer*, 141 N. C., 452.

No valid objection, therefore, can be made to the judgment of the Justice of the Peace, which rests solely on exceptions to his jurisdiction of the cause. And we are of opinion that the objection to the judgment, by reason of the method by which the next friend was appointed for the infant plaintiff, is not of itself sufficient ground to justify the Court in treating the said judgment as a nullity, or in ignoring its effect on the rights of these parties, while it stands as the judgment of the Justice's court. The Revisal of 1905, chapter, Civil Procedure—Title, Parties, sec. 405, provides, that in all actions or proceedings where there is no general or testamentary guardian, or when the suit is against such guardian, infant plaintiffs may appear by their next friend. And sec. 1473, provides: "That the chapter on Civil Procedure, respecting forms of actions, parties to actions, the time of commencing actions, and the service of process, shall apply to Justice's courts." But in neither section, nor elsewhere in the statute law, so far as we can discover, is the special method indicated by which such next friend must be appointed. For this reason, no doubt, the Supreme Court, acting under sec. 1541, Revisal, conferring upon this Court the right, for time to come, to prescribe rules of practice for the Superior Courts, have established a way by which the "next friend" shall be appointed in that court as follows:

"In all cases where it is proposed that infants shall sue by their next friend, the Court shall appoint such next friend, upon the written application of a reputable, disinterested person closely connected with such infant; but if such person will not apply, then, upon the like application of some reputable citizen, and the Court shall make such appointment only after due inquiry as to the fitness of the person to be appointed." 140 N. C., 683, Rules of Practice of Superior Court, No. 16.

As stated, this is the rule to be followed in regard to actions and proceedings in the Superior Court; and we think the same care and circumspection required for such appointments in the Superior Court, as indicated in this rule, should be followed in courts of Justices of the Peace. But in reference to actions before Justice's court, we think both the investigation into the fitness of the next friend and the order appointing him should be made by that officer.

If it should be conceded, however, that this is faulty procedure, and that the action of the Justice of the Peace in the present instance was not an adoption and ratification of the action of the Clerk, the defect is only an irregularity, and the judgment entered having been paid in full, the obligation is of itself, and on that ground, no longer of the substance. Why set aside a judgment for irregularity, at the instance of plaintiff, which was rendered to the full limit of a Justice's jurisdiction, and has already been paid? And, so far as we have examined, the authorities are uniform that the defect suggested, in reference to the appointment of the next friend, is at most only an irregularity. *Carrol v. Montgomery,* 128 N. C., 278; *Tate v. Mott,* 96 N. C., 19; *Fowler v. Poor,* 93 N. C., 466; 14 Ency. Pl. & Pr., 1016; 22 Cyc., 641.

In 14 Ency. Pl. & Pr., *supra,* it is said: "Where the proceedings are conducted without the intervention of a next friend, or a guardian ad litem, in a case where one is required or where the appointment is irregular, the judgment is irregular and voidable. But, while a failure to appoint a next friend or guardian ad litem or to sue by one is irregular, it is only that. The defect is not a jurisdictional one, and hence the judgment is not void."

And the reference to Cyc. is to like effect. In the case of *Tate v. Mott, supra,* it was held, that "where an infant appeared by attorney, and had no next friend or guardian, the judgment is not void, but only voidable."

Even if the next friend in the present case, therefore, was not appointed according to the course and practice of the Court, the judgment is not on that account void, as contended by plaintiff; and his position, in that respect, also, was properly overruled by the trial Judge.

We do not, however, approve of his Honor's view that, on the pleadings and in this case, it was not open to plaintiff to assail the judgment had before the Justice of the Peace, on the ground that the action was instituted and judgment procured by fraud, and with the purpose of depriving plaintiff of his just demands. Though the judgment may have been to some extent irregular, it stood as the final deliverance on the rights of the parties in this case, and that being true, and particularly as it had been paid and satisfied, if it was obtained and procured by fraud, an independent action to set the same aside by reason of the fraud, and declare the entire proceeding a nullity, was the proper and only proceeding by which he could obtain relief. *Carter v. Rountree,* 109 N. C., 29; *Smith v. Fort,* 105 N. C., 446; *Mock v. Coggin,* 101 N. C., 366.

In *Mock v. Coggin,* the doctrine is stated as follows: "1. Any error committed or fraud perpetrated in the conduct of an action which has regularly terminated cannot be remedied by a motion in the cause, but relief must be sought by an action to impeach the former proceedings; and this action is only open to the parties to the original suit.

"2. Where persons who were not parties to the original suit are the contestants in an issue of fraud alleged to have been perpetrated in the course of the progress of the cause, the remedy must be sought in an independent action."

And this, being relief obtainable under our former system by original bill in equity, is now to be asserted by action in the Superior Court. True, as contended by defendants, the authorities are to the effect that such relief must be obtained, if at all, by direct proceedings instituted for the purpose. But on the pleadings in this case, and the facts therein alleged, this is the direct and proper proceeding for the purpose indicated.

The defendant, having in his answer, set up the judgment in bar of plaintiff's demand, the plaintiff replied alleging fraud in impeachment of the judgment. All the parties in interest are before the Court, the reply is according to the course and practice of the Court, the defendant is fully apprised of the objection made to the validity of the judgment, and the proceedings are as direct as they can well be made. There is some confusion and apparent conflict in the decisions as to this term "direct proceedings" frequently used in reference to the method by which a judgment may be attacked. It arises to some extent from the fact that under our old system, when Courts, law and equity, were separate, or legal and equitable relief were administered on different sides of the docket, in an action at law, relief for fraud against a judgment could not be, as a rule, awarded, because such relief, as stated, was only obtainable in equity, and consequently, when a party to such action at law endeavored to set up fraud against the validity of a judgment, relief was denied because it had to be sought by direct and proper proceedings, by "bill in equity." But under our present system, where Courts are empowered to administer full relief in one and the same action, when all the parties to be affected by the decree are before the Court, and a judgment is set up in bar and directly assailed in the proceeding for fraud, this is a direct and proper proceeding to determine its validity. When a final judgment is assailed for fraud *aliunde*, the direct proceeding is by action, and if its validity is embraced within the scope and purpose of the action and the issue is raised by pleadings germane to the relief demanded, the proceeding does not cease to be direct because other issues may be also involved.

In *Earp v. Minton*, 138 N. C., 202, being an action of claim and delivery for personal property, the plaintiff, Dorinda Earp, claiming to be the owner, sought to impeach a judgment for fraud which established the title of the property in one Cranor, who had sold to defendant. There was no claim or allegation made in the pleadings that the judgment was obtained by fraud, nothing to apprise the defendant that the validity of the judgment on which his title rested was questioned till the evidence was offered on the trial, and further, defendant's vendor, whose interest would be affected by a decree, was not a party. Apart from this, the action had been commenced before a Justice of the Peace, and that Court having no jurisdiction to hear and determine the question of fraud in the judgment, the plaintiff was compelled to rely on the legal title under the facts and conditions as they existed, and the Court properly held that the action could in no sense be held a direct proceeding to assail the judgment for fraud.

In this case, however, the Court is of opinion, as stated, the judgment before the Justice of the Peace having been set up in bar of plaintiff's demand, and plaintiff having replied according to the course and practice of the Court alleging that the judgment was procured by fraud, and all parties to be affected by the decree being before the Court, that the present action should be considered and held as a direct proceeding to assail the judgment; and the issues arising on the pleadings should have been submitted to a jury. The authority cited from another jurisdiction, apparently contrary to this view, is not approved.

There was error in dismissing plaintiff's action, and the judgment below in that respect is

Reversed.

H. W. RABON v. ATLANTIC COAST LINE R. R. CO.

(Filed 5 November, 1908).

1. **Penalty Statutes—Carriers of Goods—Demand in Writing—Parol Evidence—Burden of Proof.**

   In an action for penalty, under Revisal, sec. 2634, against a carrier for failure to pay or adjust a claim within a specified time after filing it with the carrier's agent, parol evidence was competent to show that plaintiff filed his claim, and was subsequently paid the amount thereof; (1) The contents of the paper were collateral to the controversy and it was not necessary to introduce it in evidence; (2) The writing was in the carrier's possession and could be used for the purposes of contradiction; (3) The burden of proof was on the carrier to show that the claim was not filed, or was excessive.

2. **Penalty Statutes—Carriers of Goods—Failure to Pay and Adjust Claim—Proviso—Recovery Full Amount Claimed—Settlement.**

   The proviso that consignee must first recover the full penalty under Revisal, sec. 2634, for the failure of the carrier to pay or adjust a claim under the requirements thereof, is only to protect the carrier against excessive demands and not to discourage settlements for losses. Hence, the plaintiff's right to recover the penalty in such suits is not lost by accepting settlement for damages for full amount claimed after the penalty had accrued.

ACTION heard before *Lyon, J.*, and a jury, July Term, 1908, of COLUMBUS. Defendant appealed.

Junius Davis for defendant.
No counsel for plaintiff.

CLARK, C. J. The facts are thus stated in the defendant's brief: "On 12 December, 1906, Wingo, Ellett & Crump shipped from Richmond two cases of shoes, valued at $58.93, to the plaintiff at Chadbourn, N. C. The shoes were lost and never delivered to the plaintiff, and on 9 January, 1907, he filed a claim in writing with the agent of the defendant at Chadbourn for the price of the shoes. The claim was not paid or adjusted within ninety days after it was filed with defendant's agent, as provided in sec. 2634 of the Revisal of

1905. In June, 1907, plaintiff brought two suits against the defendant before a Justice of the Peace, one to recover the value of the lost shoes and the other for the penalty given by the statute above-mentioned. Judgment was given by the Justice in favor of the plaintiff in both cases, and defendant appealed to the Superoir Court in both cases. Three or four months afterwards, and while these two actions were still pending in the Superior Court, the defendant paid plaintiff $58.93, amount claimed by him as the value of the shoes, and also the costs which had accrued in the suit before the Justice of the Peace, brought by the plaintiff to recover for the loss of the shoes. Upon the trial of this action judgment was given against the defendant for the penalty of $50."

The defendant excepted, (1) Because the plaintiff was allowed to testify that he filed his claim in writing with defendant's agent and was subsequently paid by the defendant the amount which he claimed. This was a fact as to which the plaintiff could testify. The contents of the paper were collateral to this controversy and it was not necessary to produce the paper. *Andrews v. Grimes*, at this term, and *Ledford v. Emerson*, 138 N. C., 503, and cases there cited. Besides, the paper was in the defendant's possession who could have produced it to contradict the plaintiff if necessary. The requirement being a "proviso" in the section, the burden was on the defendant to prove that the claim was not filed, or was excessive. *State v. Norman,* 13 N. C., 222; *State v. Downs,* 116 N. C., 1064.

The defendant further excepted, (2) on the ground that the plaintiff having accepted payment for the lost goods could not recover the penalty for delay to "adjust and pay" said loss within the time prescribed by the statute, Rev. 2634. This point has been held adversely to the defendant's contention. Walker, J., speaking for the Court, in *Albritton v. R. R.*, at this term. The proviso in section 2634, "unless such consignee recover in such action the full amount claimed, no penalty shall be recovered" is to be stressed on the words "full amount claimed." The section means that if goods are lost or damaged, and a claim in writing is filed, upon failure to pay in the prescribed time, the carrier can be sued not only for the loss or damage, but for a penalty of $50 for failure to "adjust and pay" the same, with a proviso, that if the plaintiff shall sue and fails to recover judgment for the full amount of the sum specified in his written claim, he shall recover no penalty. Voluntary payment by defendant is as full guarantee against excessive demands as an involuntary judgment. The object was to prevent consignees from filing claims for excessive amounts and harassing the carrier with suits therefor, when if a claim for a just amount were filed it might have been paid. The intention is to give a penalty only when payment of a just claim is delayed. It was not intended to prevent parties accepting payment of the amount of their loss or damage, when payment has been delayed beyond the prescribed time. The object of the law is not to discourage settlement for losses, but suits for excessive demands.

In this case the plaintiff did in fact "recover judgment" for the full amount of his claim, but after the appeal was taken, the defendant thought better of it and paid the full amount of such judgment and costs. This is plenary admission, and not a denial of plaintiff's right to recover the penalty.

The defendant relied upon *Best v. R. R.*, 72 S. C., 479, but counsel had not seen *Albritton v. R. R., supra*, in which this Court declined to follow *Best v. R. R.*, and adopted the views expressed in the dissenting opinion in that case, as the better reason. *Eller v. Eller,* 140 N. C., 140, has no application, for the penalty is a separate cause of action and not a part of the damages.

No error.

H. W. WHARTON et al. v. CITY OF GREENSBORO.

(Filed 5 November, 1908).

1. **Taxation, Limitation Imposed On—Legislative Power—Constitutional Law.**
   The limitation imposed upon cities in creating a bonded indebtedness is by statute, Revisal, sec. 2977, and not a constitutional one.
2. **Same—Ratification.**
   The Legislature, having the power to impose a general limitation upon the taxing power of municipalities, may ratify a bond issue previously declared invalid by the Courts on that account, and except any particular municipality from the operation of the general law.

ACTION tried by *Webb, J.*, February Term, 1908, of GUILFORD. From the judgment rendered, plaintiff appealed. The facts are fully stated in the opinion of the Court.

Shaw & Hines for defendant.
Plaintiff not represented in this court.

BROWN, J. This action was originally brought to restrain the issuing of certain bonds. The Judge below refused to grant a restraining order to the hearing, and, on appeal, this Court held that the thirty thousand dollars bond issue was illegal because such issue would make the debt of the city in excess of the limitation imposed by sec. 2977 of the Revisal, and remanded the cause that an injunction might be granted, enjoining the issue of said bonds. *Wharton v. Greensboro*, 146 N. C., 356. The special session of the Legislature, held in 1908, passed an act legalizing the said thirty thousand dollars bond issue, which act is set out in the printed record.

At the February Term, 1908, of Guilford Superior Court, the defendant filed a supplemental answer, setting out the above-mentioned act, and alleging that said act legalized the school bond issue. The cause came on for final judgment, and it was held by the Court below that the act above mentioned had legalized the bond issue, and the Court refused to grant an injunction restraining the city from issuing said bonds. The plaintiff excepted to the ruling of the Court and appealed. This raises the only question presented for our decision.

The bonds in question were declared invalid by the Court, for the sole reason that the debt to be created thereby would exceed the statutory limit provided in sec. 2977 of the Revisal. And, it is to be observed, that such limitation is, in this State, a legislative and not a constitutional limitation.

In the Constitution of many States of the Union there are limitations upon the amount of indebtedness which a municipal corporation may lawfully contract. And it is to be regretted that there is no such wise and protective provision in our Constitution.

As in this State the limitation is legislative only, it follows that the General Assembly can repeal it *in toto*, or except any particular municipality from its operation.

In this case, the defendant had authority, under its charter, to contract the debt, but subordinate to the general law, Revisal, 2977, which we held was not repealed by implication, and, therefore, so much of the issue as was in excess of the limitation, we enjoined. So far as defendant is concerned, and as to this special issue, the limitation is removed by the act of 1908. The question is, can the Legislature subsequently legalize the contract of a municipal corporation which it had no power to make at the time it attempted to do so? The general rule seems to be, that where a municipal corporation has made a contract, not within its statutory powers, but within the powers which the Legislature might have lawfully conferred upon it, the Legislature may subsequently legalize such contract. *Baker v. Seattle*, 2 Wash., 576; *Thompson v. Lee County*, 70 U. S. (3 Wall.), 327; *Single v. Marathon County*, 38 Wis., 364; *Kenoshaw v. Lawson*, 76 U. S (9 Wall.), 477; *Redland v. Brooks* (Cal.), 91, p. 150; Current

Law, Advance Sheets, p. 877; 25 Am. & Eng. Enc., 1228; 6 Am. & Eng. Enc., 942, and cases cited.

The following cases hold that the Legislature by a curative act may subsequently validate the bonds of a municipal corporation issued by it without the power so to do. *Noland County v. State,* 83 Texas, 183; *Knapp v. Grant,* 27 Wis., 147; *Rogers v. Keokuck,* U. S., 18 L. Ed., 74; *Bank v. Brunswick,* 101 U. S., 129; *Deyo v. Otoe County,* 37 Fed., 246; *McMullen v. Boyles,* 6 Iowa, 304; *Steines v. Franklin County,* 48 Mo., 167.

Most of the authorities on this question are to be found in the note to *Erskine v. Nelson County,* 27 L. R. A., 696.

From the foregoing authorities it seems to be settled that the Legislature may subsequently legalize any contract of a municipal corporation if it could previously have authorized it. We are of opinion that the bond issue is valid.

We take pleasure in acknowledging our indebtedness to the excellent brief of Judge Shaw, of counsel for the defendant, for the numerous and pertinent authorities cited.

The judgment of the Superior Court is

Affirmed.

H. L. LUTTERLOH et al. v. CITY OF FAYETTEVILLE.

(Filed 5 November, 1908).

1. **Municipal Corporation—New Territory—Exercise of Jurisdiction Remedy by Injunction.**

When the relief sought is to restrain a town from exercising jurisdiction within a territory recently included within the municipality, the proper remedy is an action for perpetual injunction, and when there are no issues of fact raised, and the injunction is refused, the Judge must necessarily determine the case upon its merits.

2. **Municipal Corporation—Boundaries—Description, Sufficiency of —Evidence.**

When it is found as a fact by the trial Judge, that the increased boundaries of a town, as fixed by a legislative act, include the *locus in quo*, and the section of the act setting out the boundaries is not void for uncertainty, the question as to whether the plaintiff's property was included in the boundaries prescribed does not arise on appeal in an action including such inquiry.

3. **Municipal Corporations—Territory Annexed—Aye and No Vote—Constitutional Law.**

When a municipal charter has been passed in accordance with Art. II, sec. 14, of the Constitution, requiring the aye and no vote to be taken on the several days, it is not necessary for an act annexing territory thereto to be passed in like manner to confer authority for the levying of taxes within the territory annexed.

4. **Municipal Corporations—Constitutional Law—Taxation—Representation.**

An objection to the validity of an act adding territory to that of a town, for that it restricted the right to vote on the subject of municipal taxation to the voters within the annexed territory, is without merit, when it appears from a construction of the act as a whole that a contrary intention is declared.

5. **Municipal Corporations—Territory Annexed—Consent of Voters —Legislative Powers—Constitutional Law.**

As there is no constitutional restriction here, our Legislature may annex contiguous or adjoining territory to that of a municipality, without the consent of the voters thereof, or of the old territory, and such action is not subject to review by the Courts.

6. **Municipal Corporations—Charters—Contractual Rights — Vested Rights—Legislative Powers—Constitutional Law.**

No vested rights can accrue under a municipal charter as it is not a contract between the citizens of the municipality and the State; nor can valid objection be made to the Legislature annexing territory thereto on the ground that the old territory owed debts, for the presumption is that value was received which inures to the benefit of those residing within the territory annexed.

ACTION, from CUMBERLAND, heard by *Long, J.*, brought to obtain a perpetual injunction to restrain defendant from collecting taxes out of the residents in the territory in the extension of city limits, or from exercising any jurisdiction over persons or property resident in the extension, under chap. 489, Private Acts of 1907, entitled "An act to enlarge corporate limits of the city of Fayetteville," ratified 11 March, 1907.

A temporary restraining order was issued, and being heard upon the pleadings, affidavits and exhibits, the Court found the material facts, dissolved the injunction, and plaintiff appealed, and filed exceptions to said findings and judgment.

C. W. Broadfoot, George M. Rose and *John W. Hinsdale* for plaintiff.

J. Sprunt Newton, Sinclair & Dye for defendant.

BROWN, J. 1. The plaintiffs contend that the Judge should have passed solely upon the necessity for continuing the injunction to the hearing, instead of going fully into the case and deciding the entire controversy.

As the only relief asked for in the complaint is a perpetual injunction restraining the defendant's authorities from exercising any jurisdiction within the territory recently included within the municipality, it would have been impossible intelligently to determine whether to continue the restraining order without considering and determining the legal issues presented in the pleadings. There seems to be no controverted issue of fact raised therein necessary to be submitted to a jury.

An action for a perpetual injunction is the proper remedy in controversies of this character (28 Cyc., 212), and where the Judge refuses to enjoin the exercise of jurisdiction over the annexed territory, he must necessarily determine the case on its merits.

2. It is contended that the boundaries given in the act of 1907 cannot be located, and that they are indefinite, uncertain and void.

There appears to have been an omission of certain words in enrolling the act of 1907, which error has been cured by the act of the special session of 1908, Private Laws, chap. 22, but independent of the effect of this latter act, the Judge below finds upon the testimony of the surveyor that the boundaries of the city, including the extension under the act of 1907, have been located, and that they embrace plaintiff's property.

The surveyor testifies, that locating the boundaries under the act of 1907 covers the same territory as those included in the amendatory act of 1908, except a small vacant and unimproved space, containing one and nine-tenths acres of land.

This testimony of the surveyor is adopted by the Judge as a fact and made a part of his findings. We think that settles the question so far as this Court is concerned, as the first section of the act setting out the boundaries is certainly not void on its face.

3. It is contended that the act of 1907 was not read on three several days and an aye and nay vote taken and recorded, as required by the Constitution, art. 2, sec. 14, and that, therefore, the act is void and can confer no power to levy a tax within the annexed territory. For this position plaintiffs rely on the case of *Cotton Mills v. Waxhaw,* 130 N. C., 293.

The charter of the city of Fayetteville, as at present organized, was enacted in 1893, and contains full authority for the levying of taxes within the municipal boundaries, however those boundaries may be extended by subsequent legislation.

The *Waxhaw Case* is authority for the position, that a municipal charter conferring power to levy a tax must be enacted in accordance with that section of the Constitution. It is not contended that the charter of Fayetteville, enacted in 1893, is void for such reason.

The act of 1907 does not purport to authorize the levying of any tax or the contracting of any debt, and there is nothing on its face which could indicate to the General Assembly that it is one of those bills coming within the purview of section 14, article 2 of the organic law. It is not a city charter, but only an act annexing territory to a chartered municipality already in existence.

4. The plaintiffs except to the following rulings of the Court: "That, although the terms of the act of 11 March, 1907, do not prescribe with such definite clearness as they might have done who were qualified voters under the act, nevertheless, construing all of the parts thereof, it would seem that the Legislature intended to provide that the voters of the old town and the annexed district were all entitled to vote in said election. But the act itself is made a part of this finding."

The plaintiffs contend that the intention of the Legislature was to confine the election to the voters of the annexed district.

The language of the act would seem to give color to such contention, but taking the entire act as a whole, a careful reading of it, we think, justifies his Honor's interpretation.

Section 1, of the act describes particularly the territory to be annexed, then adds: "Provided, that no part of the city limits as now existing shall be eliminated from said city when so extended."

Section 3, provides for an election of "all persons embraced in the above-described boundaries," in which must necessarily be included all parts of the city as then existing; and it also provided "for a registrar of voters living in the city of Fayetteville, including said above-described territory." The same section requires the registrar to register "such persons in said city, and in said above-described new territory as may present themselves for registration and are qualified to vote in city elections and not *at present registered.*"

These last words indicate clearly that the legislative intent was that all qualified voters in the old and new territory should be allowed to register and participate in the election.

5. Another and final objection made to the act of annexation is, that the object sought to be accomplished by it, in the mode provided, is beyond the power of the General Assembly, because it authorizes annexation, and consequently, taxation, without the consent of those who are affected by it.

We have held in common with all the Courts of this country, that municipal corporations, in the absence of constitutional restrictions, are the creatures of the legislative will, and are subject to its control; the sole object being the common good, and that rests in legislative discretion. *Dorsey v. Henderson* and *Perry v. Commissioners,* at this term; *Manly v. Raleigh,* 57 N. C., 372.

Consequently, it follows that the enlargement of the municipal boundaries by the annexation of new territory, and the consequent extension of their corporate jurisdiction, including that of levying taxes, are legitimate subjects of legislation. In the absence of constitutional restriction, the extent to which such legislation shall be enacted, both with respect to the terms and circumstances under which the annexation may be had, and the manner in which it may be made, rests entirely in the discretion of the Legislature. With its wisdom, propriety or justice we have naught to do.

It has, therefore, been held that an act of annexation is valid which authorized the annexation of territory, without the consent of its inhabitants, to a municipal corporation, having a large unprovided for indebtedness, for the payment of which the property included within the territory annexed became subject to taxation. *Powers v. Wood Co.,* 8 Ohio St., 285; *Blanchard v. Bissell,* 11 Ohio St., 96; *Richards v. Cincinnati,* 27 L. R. A., 746, and cases cited in note.

In the first cited case, the Supreme Court of Ohio says that there is no constitutional provision on the subject, and that "it would require a very artificial and unsound mode of reasoning to hold that territory could not be annexed to a town which owed debts, until the owners of such territory were paid a compensation in money for a proportional part of such debt"; and, further, "that it is not to be presumed that a municipal corporation has contracted a debt without being correspondingly benefited."

In the *Richards' Case, supra,* it is said, "it is not perceived how the amount or nature of the municipal indebtedness can affect the right of annexation if it be otherwise legal; for the power to bring into a municipal corporation by annexation, property not theretofore subject to taxation for municipal purposes, and lay taxes upon it to raise funds for the payment of any previously existing municipal debt, necessarily includes the power to do so for the payment of every such debt lawfully incurred. Persons thus brought into the annexing corporation and their property, like all of its other inhabitants and their property, receive and enjoy the benefits of all local improvements and should share the burdens existing when the enjoyment commences." See also *St. Louis v. Russell,* 9 Mo., 507; *Smith v. McCarthy,* 56 Pa., 359; *McCallie v. Chattanooga,* 3 Head., 317; *New Orleans v. Cazela,* 27 La., Ann., 156; *Montpelier v. East Montpelier,* 29 Vt., 12.

Judge Dillon, in his work on Municipal Corporations (4 Ed.), sec. 185, cites an array of authority in support of his text: "Not only may the Legislature originally fix the limits of the corporation, but it may, unless specially restrained in the Constitution, annex, or authorize the annexation of, contiguous or other territory, and this without the consent, and even against the remonstrance, of the majority of the persons residing in the corporation or in the annexed territory. And it is no constitutional objection to the exercise of this power of compulsory annexation that the property thus brought within the corporate limits will be subjected to taxation to discharge a pre-existing municipal indebtedness, since this is a matter which, in the absence of special constitutional restriction, belongs wholly to the Legislature to determine." Such legislative enactments involve no sort of a contract between the General Assembly, on the one part, and the citizens of the locality to be annexed, on the other part.

This was settled in this State as long ago as 1850 in *Mills v. Williams,* 33 N. C., 558, and reiterated in *Manly v. Raleigh, supra,* and subsequent cases.

The doctrine of those cases was acted upon by the Supreme Court of the U. S. in the *Memphis Case,* 97 U. S., 284, when it held that: "The charters and constituent acts of public and municipal corporations are not, as we have seen before, contracts, and they may be changed at the pleasure of the Legislature, subject only to the restraints of special constitutional provisions, if any there be."

And the same position is affirmed in the recent case of *Hunter v. City of Pittsburgh,* 207 U. S., 161, wherein it is said: "There is no contract between the citizens and the taxpayers of a municipal corporation and the corporation itself, that the former shall be taxed only for the uses of the enlarged municipality formed by annexation under the authority of Pa. act of 7 February, 1906, to an adjoining and larger municipality.

"Citizens and taxpayers of a lesser municipality annexed under authority of this act, to an adjoining and larger municipality, are not deprived of their property without due process of law by reason of the burden of additional taxation resulting from consolidation, although the method of voting prescribed by the statute has permitted the voters of the larger city to overpower the voters of the smaller one, and compel the union without their consent and against their protest."

Upon a review of the entire record the judgment of the Judge below is

Affirmed.

J. M. CUTHBERTSON v. ENOCH MORGAN.

(Filed 5 November, 1908).

1. **Deeds and Conveyances—Reformation—Evidence—Questions for Jury.**

   In an action to correct or reform a written instrument, when there is more than a scintilla of evidence, it is for the jury, and not the Court, to say whether the evidence is clear, cogent and convincing.

2. **Deeds and Conveyances—Reformation—Equitable Relief—Covenants—Support—Charge on Land.**

   Defendant executed a note, and to secure it executed a mortgage on his land. Thereafter, he entered into a written contract with plaintiff to convey to him a remainder in interest in one-half the land, upon condition that he would pay off the note and mortgage in small annual instalments; and if, at the time the mortgagee demanded payment, the plaintiff could not meet it, he would find some one to carry it, in which event defendant and his wife were to "renew the note and mortgage." Upon the payment of the note and mortgage or any renewal or renewals thereof, the defendants were to execute a deed to the land, reserving a life estate. The plaintiff paid a small amount on the debt and, being forced to do so, borrowed the balance and called upon defendants to join with him in securing it by mortgaging the land, and instituted action upon their refusal. Upon allegation and proof, defendants, by the verdict of the jury, engrafted a parol contract upon the written one, that, in addition, the plaintiff was to take care of defendants during life and see that they do not suffer. *Held*, (1) That as plaintiff, after the verdict, asked for a decree for reformation and specific performance, he is entitled in equity to have the defendants execute the mortgage in renewal, or substitution; (2) That the agreement of support, etc., is a covenant and not a condition precedent; (3) That

defendants' support, or an amount reasonably sufficient therefor, in their condition in life, should be fixed and made a charge on the land; (4) That, if so desired, a reference should be had to ascertain what, if anything, is due on account of defendants' support in the past.

ACTION tried before *Jones, J.,* and a jury, February Term, 1908, of UNION.

The pleadings, evidence and verdict disclose the following case: Defendant, Enoch Morgan, was the owner of the tract of land described in the complaint, on which he resided for many years. He married the *feme* defendant, Esther, the mother of the plaintiff, by a former marriage. Plaintiff was, at that time, about five years of age and lived with defendants, on the land in controversy, until he was about eighteen years of age. On 27 March, 1902, defendant, Enoch Morgan, executed his note to Charles N. Simpson for $248.35, and, to secure the payment thereof, he, with his wife, executed a mortgage on said land. On 24 August, 1903, the defendant Enoch Morgan, with his wife and plaintiff, executed a contract in writing, whereby the defendants agreed to convey to plaintiff the portion of said land described in the contract, being one-half of the tract, reserving to themselves and the survivor a life estate. Plaintiff, in consideration of said promise to convey, agreed to pay off and discharge the note and mortgage to Simpson, in annual instalments of $40. It was further agreed, and so written in the contract, that if plaintiff was unable to pay said debt at the time Simpson demanded payment, he should find some one to carry it and, "if it should be necessary to that end, said Enoch Morgan and wife are to renew the note and mortgage." The contract concludes with these words: "Now, on payment of said note and mortgage, or any renewal or renewals thereof, the said Enoch Morgan and wife Esther are to execute and deliver to said J. Madison Cuthbertson a deed in fee simple for said tract of land, reserving a life estate for them and the survivor of them in that portion above mentioned, and then this contract shall be fully performed." The contract was duly proven and recorded. Plaintiff paid $40 on the debt, and borrowed from L. S. Griffin the sum of $300 with which to pay the balance, executing to H. B. Adams, Esq., a deed in trust on the said land for the purpose of securing the payment of said $300. The following words are endorsed on the note: "Paid in full by J. Madison Cuthbertson, 5 January, 1907. C. N. Simpson." Plaintiff demanded that defendant execute a deed to him or join in the mortgage to secure the amount borrowed to take up the Simpson note, which defendant refused to do. Defendant claimed that, in addition to paying the Simpson note, plaintiff was to maintain and support his wife and himself, and that this promise was a part of the consideration for the conveyance of the land. He also claimed that this part of the agreement was omitted from the contract by the mistake or inadvertence of the draftsman. The defendant, at all times, continued to live on the land, cultivating or renting it, and using the produce made thereon; he made no demand upon plaintiff for any support. Morgan says: "I gave it to him to pay Mr. Simpson a little money that was between me and him—no other consideration. He was to take care of me and my wife and see that we don't suffer for anything." There was testimony tending to sustain and also to contradict the defendant's contention in respect to the agreement to take care of him. Mr. Simpson, who drew the contract, testified that "all of the parties were present, that he drew the contract at the request of Enoch Morgan." "They all rehearsed what they agreed to do and asked me to fix the paper. I drew the paper and asked them if that was what they wanted, and they all agreed to it. I had them all then to sign it and I witnessed it. I just read it over to them; they told me what they wanted, and they agreed to the paper that I drew. This clause about providing for a renewal of mortgage in case I did not want to wait, was really a suggestion of mine, but they approved that part of it and readily assented to it." He says he did not suggest to plaintiff to go into it; knew nothing about it until they came to him; he did not remember that anything was said about plaintiffs supporting defendants. Defendant Esther Morgan corroborated plaintiff and Simpson in regard to the agreement and what occurred when it was written. There was evidence that plaintiff put permanent improvements on the land. Upon issues submitted, the jury found that the contract was executed and written, and that defendant had refused to execute the mortgage in renewal of the one held by Simpson; that it was a part of the consideration of the contract that plaintiff should maintain and support the defendant, as alleged in the answer; that this part was omitted from the contract by mistake or inadvertence of the draftsman; that plaintiff had not complied with his part of the contract and that the value of the improvements put upon the land by plaintiff was $300. The plaintiff moved for judgment upon the verdict, that the contract be reformed in accordance with the verdict. Refused, and plaintiff excepted. He then moved for judgment for the value of his improvements. Refused, and plaintiff excepted. His Honor rendered judgment that plaintiff was not entitled to a conveyance of the land; that the debt due L. S. Griffin of $300 be declared a lien upon the land, and that defendant execute a mortgage to secure same. Plaintiff excepted. There were other exceptions to the admission and rejection of testimony and to instructions to the jury. Plaintiff appealed.

Adams, Jerome & Armfield for plaintiff.
Redwine & Sikes for defendant.

CONNOR, J., after stating the case: We have examined the record and exceptions in regard to the conduct of the trial, including his Honor's instructions to the jury, and find no prejudicial or reversible error. His Honor instructed the jury, upon the issue directed to the alleged mistake in the contract, in accordance with the decisions of this Court. It must, we think, be conceded that the evidence, in this respect, was not so "clear, cogent and convincing" as would have been required by a Chancellor, under the procedure prevailing prior to the change in our system of administering equitable remedies. The weight of the evidence, conceding that all of the witnesses were speaking truly, was against the contention of the defendant in that respect. Having held, however, that although the evidence must be "clear, cogent and convincing" to entitle a party to correct or reform a written instrument, the Court had no right to withhold the case from the jury. If there was more than a scintilla of evidence, we cannot hold, as a matter of law, that the evidence is not "clear, cogent and convincing," that being for the jury. *Lehew v. Hewit,* 130 N. C., 22. The protection which the law theoretically throws around the rights of parties who have reduced their contracts to writing, is made of but little practical value when the jury may set aside the written word upon testimony which a Chancellor would consider entirely insufficient. In this record it appears, without serious contradiction, that the parties voluntarily went to an intelligent, disinterested draftsman, stated their agreement, and after having read it to them, expressed themselves as satisfied and executed it. Two of the parties and the draftsman testified to this and, upon the testimony of the other party, an additional provision is inserted in the contract. It will be observed that only half the land is to be conveyed and, in this, defendants reserve a life estate, hence the plaintiff does not come into possession of any property from the proceeds of which he can pay the Simpson debt and provide support for defendants. The defendants knew that plaintiff was a man of small means and contemplated that he would be unable to pay the debt at once, provided that he should pay it in annual instalments of forty dollars and, provided further, that if Simpson demanded payment prior to the time plaintiff was to pay, according to the contract, that they would execute mortgage in renewal of the one to Simpson. The plaintiff was therefore entitled to have them execute the mortgage under the terms of the contract, as written and executed. The defendant Enoch Morgan refused to carry out his part of the contract in respect to executing the new mortgage, alleging that, as an additional consideration for conveying the land, plaintiff was to support him and his wife and "see that they did not suffer for anything," and this provision was omitted by mistake. To avail himself of this contention he was compelled to invoke the equitable power of the Court. Until the contract was reformed they were unable to resist the plaintiff's equity to compel them to execute the mortgage. The fact that they invoked the aid of the Court, by way of defense or counterclaim, is not material. If, after the facts were found, the plaintiff had refused to submit to a decree for reformation and specific performance, of course the Court would have dismissed his action. He, however, asks the Court to reform the contract and permit him to perform his part of it as reformed. This, we think, he had a right to do under the maxim, "He who asks equity must do equity." In regard to this well established equitable maxim, Prof. Pomeroy says: "Whatever may be the nature of the controversy between two definite parties, and whatever the nature of the remedy demanded, the Court will not confer its equitable relief upon the party seeking its interposition and aid, unless he has acknowledged and conceded, or will admit and provide for, all the equitable rights, claims and demands justly belonging to the adversary party and growing out of, or necessarily involved in, the subject matter of the controversy. It says, in effect, that the Court will give the plaintiff the relief to which he is entitled only upon condition that he has given, or consents to give, the defendant such corresponding rights, as he also may be entitled to in respect to the subject matter of the suit." Pom.

Eq., sec. 385. It will be observed that one of the limitations of the doctrine is that the counter equity, which the Court will enforce in such cases, must be involved in, or grow out of the transactions in respect to which the equitable relief is invoked, or, as said by the same author, "According to its true meaning the terms imposed upon the plaintiff, as the condition of his obtaining the relief, must consist of the awarding, or securing, to the defendant something to which he is justly entitled by the principles and doctrines of equity." *Ib.*, 386. The Court will not, arbitrarily, impose conditions or require him to pay for the relief by doing, or abstaining from doing, something demanded by the other party against whom the relief is granted, separate and distinct from the transaction involved in the litigation out of which the demand for relief grew. For instance, if the plaintiff will seek to enjoin the sale of his property under mortgage, because of usury charged for the loan of the money secured, the Court will grant the relief upon condition that he pay the debt with lawful interest, or, if one seek to redeem his land from a tax sale for irregularities, sufficient to entitle him to relief, it will be granted upon payment of the lawful taxes paid by defendants, and this is true independently of any statutory requirement. In *Morisey v. Swinson*, 104 N. C., 555, it is said: "When a plaintiff seeks to correct a deed in his own favor, the Court will refuse its aid unless he is willing that the other mistakes therein should be corrected which would be against his interest." He who asks equity must do equity. It would seem that, applying this maxim of equity to the facts before us, the defendants should be required, before, or as a condition to having the contract reformed, to specifically perform on their part, when the plaintiff expresses a willingness to perform his covenants. It would be unjust to the plaintiff to grant relief to the defendants by reforming the contract and, at the same time, construe the inserted language as a condition precedent and declare a forfeiture of all rights under it. It has always been the pride of equity that it so moulds its decrees that perfect and complete justice is done in cases where the law, by reason of its rigid, stringent rules, is incapable of doing so. The law will, when possible, so construe an instrument as to avoid forfeitures, and equity delights, when invoked, to relieve against them by giving compensation for failure to comply, rather than destroying the rights of parties. It was upon this principle that courts of equity created the equity of redemption and preserved the mortgage, which, at law, was a dead pledge, into a living security for the debt, and saved to the debtor the right to redeem his land, which, according to the terms of his solemn deed, was forfeited upon failure to pay, to the uttermost farthing, on the day named. If it be conceded that, by the terms of the contract, as reformed, the plaintiff had forfeited not only his rights, under the contract, but the amount expended in permanent improvements, we think that the defendants should have been required as a condition to having the contract reformed to waive the forfeiture.

But we are of the opinion that, as reformed, the provision in regard to support was not a condition but a covenant, the performance of which should be secured by declaring it a charge on plaintiff's interest in the land to be enforced in such way as the Court may determine. We had occasion to consider a similar question in *Helms v. Helms,* 135 N. C., 164, and upon a rehearing in 137 N. C., 206. Following the line of thought and the authorities cited in that case, it is apparent that if the language, very indefinite and uncertain, is construed to be a condition, the plaintiff might, probably would, find that, upon paying the incumbrance on the land and performing the terms of the condition for many years, he would be subjected to loss of his money and the land, up to the last moment of the lives of defendants. To so construe the contract, as reformed, would be to administer equity to the defendants and, at the same time, apply to plaintiff the rigid rules of the law, because a condition precedent must, at law, be fully complied with, or the party upon whom the performance of the terms of the condition is imposed loses all of his rights under the contract. Of course, if the contract clearly imposes a condition, the law will enforce it. It is neither the duty nor the province of Courts to make contracts for parties, or to change those which they have made, but to so construe them, that, so far as can be ascertained, their purpose and intention are effectuated. There are no words of condition in this contract. The language of *Smith, C. J.*, in *McNeely v. McNeely,* 82 N. C., 183, in a similar case, is applicable here. Speaking of a covenant to support persons incorporated in a deed, he says: "The words are, in themselves, vague and indefinite and, if an essential and defeating condition of the gift, would be very difficult of application. What is meant by a 'seeing to the widow' and what neglects fall short of that duty?" In *Gray v. West,* 93 N. C., 442, the language in the deed was, "That A should have support out of the land." *Held,* that the support was a charge on the rents and profits. *Misenheimer v. Sifford,* 94 N. C., 592, and other cases cited in *Helm's Case, supra.* In that case, it was insisted that the language in the deed should be construed a condition precedent. While in this case the plaintiff has but an executory contract, it confers upon him rights corresponding to the duties assumed by him which a Court will protect and enforce. He cannot call for a deed until he pays the amount due on the Simpson debt or relieves the defendants and their land of any liability therefor, but, according to the terms of his contract, he is entitled to require the defendants to execute a mortgage in renewal of the Simpson mortgage, or by way of substitution of it. The defendants are entitled to have their support or the amount which is reasonably sufficient therefor, under the conditions, age, health, etc., fixed and charged upon plaintiff's interest in the land. So far as the failure of the plaintiff to support the defendants, since the making of the contract, is concerned, it seems that no demand was made on him and neither party treated the contract as imposing such duty upon plaintiff. The defendants had all that was made on the land and do not appear to have suffered. If so desired, a reference may be had to ascertain what, if anything, is due on that account. We are quite sure that, in the light of our decision, the intelligent counsel representing both parties will be able to draw a decree which will protect the interests of the parties. The contract is unusual in some of its provisions and some adjustment and concessions will probably have to be made to prevent further expensive litigation. It is to the interest of all concerned to do so. The judgment must be modified as indicated in this opinion. It is so ordered.

Modified and affirmed.

ISAAC H. HARRIS v. W. E. CANNADY.

(Filed 11 November, 1908).

1. **Vendor and Vendee—Warranty, What Constitutes.**

To hold a bargainor in a sale responsible for a warranty, it need not be made in express terms; for it is sufficient if the seller makes an affirmation of a material fact at the time of the sale, as an inducement, and it is accepted and reasonably relied on by the buyer.

2. **Same—Evidence—Questions for Jury.**

During the bargain and sale of a horse, the vendor was asked by the vendee if the horse was all right. The vendor said he was sound and all right; nothing the matter except a little distemper which he, being a young horse, would soon get rid of. Vendee replied, that from "what you say and from what I see of the horse, I will give you $115 for him." The vendor accepted, saying it was an insufficient price—he had too many horses—and if the vendee found him worth more, he was to pay $10 in addition. *Held*, evidence sufficient to take the case to the jury upon the question of express warranty.

ACTION tried before *Webb, J.*, and a jury, February Term, 1908, of GRANVILLE, to recover damages for breach of warranty in the sale of a horse, tried on appeal from a Justice of the Peace.

On issues submitted, the jury rendered the following verdict:

"1. Did the defendant warrant the horse sold to plaintiff to be sound and all right? Answer: 'Yes.'

"2. Was the horse sound and all right? Answer: 'No.'

"3. What damage has plaintiff sustained? Answer: '$115.'"

Judgment on the verdict for plaintiff, and defendant excepted and appealed.

Graham & Devin for plaintiff.
A. A. Hicks for defendant.

HOKE, J., after stating the case. At the last term of the Court, in the case of *Wrenn v. Morgan*, 148 N. C., 101, the Court held on this question of warranty as follows:

"1. To hold a bargainor in a sale responsible for a warranty, it is not necessary that the warranty should be given in express terms; but an affirmation of a material fact, made by a seller at the time of the sale, and as an inducement thereto, and accepted and relied on by the buyer, will amount to a warranty." Citing, to same effect, Tiffany on Sales, 162; *McKinnon v. McIntosh*, 98 N. C., 89; *Horton v. Greene*, 66 N. C., 596; *Baum v. Stevens*, 24 N. C., 411.

In this last case it was held:

"1. To make an affirmation at the time of a sale a warranty, it must appear upon evidence to have been so intended, and not a mere matter of opinion and judgment.

"2. Whether an affirmation in a parol contract of sale amounts to a warranty, is a matter of fact to be left to the jury, with instructions from the Court according to the above rule."

And Ruffin, Chief Justice, speaking to this question, said: "Besides, much may have depended upon the tone and emphasis as well as on the words of the party, and the period of his uttering them. These, we think, were all matters properly belonging to the jury, to whom they should have been submitted, with instructions that, if they collected the defendant did not mean merely to express an opinion, but to assert positively that the negro was sound, and that bidders should, upon the faith of that assertion, bid for the negro as sound, then it would amount to a warranty; otherwise, not." *Baum v. Stevens,* 24 N. C., 413.

In this case there was evidence of the plaintiff to the effect that, during the bargain and sale of the horse in question, the defendant was asked by plaintiff if the horse was "all right," and defendant replied, "Yes, he is sound and all right, and nothing the matter with him except he has a little distemper, but he is a young horse and will soon get over that." That plaintiff said, "From what you say about the horse, and what I see of him, I will give you $115 for him." Defendant replied, "That is not enough, but I have too many horses and you can take him at that, and if you find him worth more you can pay me $10 additional," and plaintiff said he would take him.

On this testimony, the Court properly submitted the question of warranty to the jury, and the exception chiefly urged for error, that his Honor declined to dismiss the case as on judgment of nonsuit, is not approved. The charge of the Court is in substantial compliance with the principles stated in the authorities cited, and there is no error in the record which gives defendant any just cause of complaint. The judgment is, therefore, affirmed.

No error.

S. M. LITTLE v. OSCAR DUNCAN.

(Filed 11 November, 1908).

1. **Partition of Lands—Procedure—Appeal—Duty of Clerk—Superior Court.**

   Under proceedings for the partition of lands, when an appeal is taken from the decision of the Clerk (Revisal, secs. 610 and 611), upon issues of law or legal inference, it is his duty to prepare and make a statement of the case and send it to the Judge (Revisal, sec. 612). Under Revisal, sec. 717, when an equitable or other defense is pleaded, the Clerk should transfer the cause to the civil docket, for trial during term, upon the issues raised, and the Judge may allow amendments to the pleadings for the purpose of hearing the case upon its merits.

2. **Partition of Lands—Order of Clerk—Revoking Order—Docketing Case for Trial.**

   The Clerk may correct a mistake made in prematurely ordering land partitioned, by revoking the order and directing the proceedings to be docketed in the Superior Court.

3. **Partition of Lands—Superior Court Jurisdiction.**

   When the Superior Court acquired possession of a case of partitioning land, in term, it should have proceeded therewith according to law, and it was error to remand it to the Clerk.

ACTION from UNION, heard by *Jones, J.*, at chambers, 19 March, 1908. Defendant appealed.

Adams, Jerome & Armfield for plaintiff.

J. E. Little, A. M. Stack and *R. W. Lemmond* for defendant.

WALKER, J. This is a special proceeding for partition of land, which was commenced before the Clerk of the Superior Court. The defendants answered and alleged certain matters, which they insisted raised issues of law and fact, and they, therefore, moved that the case should be transferred to the Superior Court for the trial and adjudication of the same. Among other things, they averred that certain advancements had been made to some of the parties, and that an account of them was necessary before any partition could be made. The Clerk overruled the motion and ordered a partition of the land, issuing a writ to the sheriff for that purpose. The defendants excepted and appealed. The Clerk afterwards reversed his decision and recalled the writ, and directed the proceeding to be docketed in the Superior Court, for the trial of the issues raised by the pleadings. The plaintiffs excepted and appealed to the Superior Court. The latter Court, Judge E. B. Jones presiding, reversed the ruling of the Clerk and remanded the case for further proceedings therein, according to law, upon the ground that the defendants had lost their appeal from the first decision of the Clerk by their laches.

By the Revisal, section 610 and 611, an appeal lies to the Judge from any decision of the Clerk, on an issue of law or legal inference, and it is made the duty of the Clerk, by section 612, to prepare a statement of the case, as therein provided, and to send the same to the Judge, and, by section 717, when a party shall plead any equitable or other defence, or ask for any equitable or other relief in the pleadings, it is required that the Clerk shall transfer the cause to the civil issue docket, for trial during term, upon all issues raised by the pleadings, and the Judge may allow amendments to the pleadings for the purpose of a hearing of the case upon its merits. If the Clerk found that he had committed an error in ordering a partition of the land prematurely, we do not see why he did not have the power to correct the mistake and comply with the statute, Revisal, section 901 (9). But however that may be, the case was finally brought before the Judge in term, and he should have proceeded to dispose of it upon its merits, instead of remanding it to the Clerk. If an issue of law or legal inference was raised by the pleadings, he should have passed upon it, and if issues of fact were presented, they should have been tried by a jury. The Superior Court had acquired possession of the case in term, even though there may have been irregularity in prior proceedings, and that Court had full power to dispose of it. The Clerk, after reconsideration, simply did what the law bound him to do, and if it appeared to the Judge when the case was presented to him that there were either issues of law or of fact raised by the pleadings, he should have proceeded to have them determined in the proper way, without further delay and regardless of the irregular procedure, if there was such, before the Clerk. If there were irregularities, no partition of the land had been made and nobody, therefore, can be prejudiced by a compliance with the mandate of the statute. If there are no issues of law or of fact raised by the pleadings, the Judge should have so decided, upon consideration of the matter, and then remanded the case for further proceedings according to law. There was error in reversing the action of the Clerk, for the reason stated.

Error.

J H. COX v. HIGH POINT, RANDLEMAN & SOUTHERN R. R. COMPANY.

(Filed 11 November, 1908).

1 **Damages—Verdict—The Word "Dollars" Omitted—Judgment.**

When the jury, in response to an issue on damages, had answered the issue "five thousand," it was not error in the trial Judge to add the word "dollars" in rendering judgment, when the pleadings, the evidence, the nature of the case and contention of the parties conclusively so indicated; and an exception taken thereto after the jury has been discharged cannot be upheld.

2. **Same—Unit of Currency.**

When, to an issue in a suit for a demand for damages, the jury has answered in an amount, leaving off the word "dollars," the Judge may, in the judgment rendered, supply the word, for the dollar is the unit of our currency, in which the judgment is to be paid, and all other coins are recognized as multiples or fractional parts thereof.

ACTION tried before *Webb, J.*, and a jury, June Term, 1908, of GUILFORD.

Justice & Broadhurst, Murphy & Wright and *R. C. Strudwick* for plaintiff.

Wilson & Ferguson for defendant.

CLARK, C. J. Action for damages for wrongful death. In response to the issue as to damages, the jury responded "five thousand." The Court entered judgment for "five thousand dollars." This was not error.

Damages are necessarily found in money values. The only words that could be entered after "five thousand" were either "dollars" or "cents," and no one ever says "five thousand cents." The U. S. Compiled Statutes, sec. 3563, provides that the "dollar," not "cent," shall be the unit of value.

Besides, the verdict, like the charge, must be construed with reference to the trial. The complaint was for thirty thousand dollars. The evidence as to damages was expressed in dollars. The Judge charged the jury that the plaintiff's contention was that he was entitled to recover "a certain amount of damages; I mean a certain amount of compensation, *so many dollars* to compensate for the value of his life." The evidence for plaintiff's intestate was that his income was $1,000 per year. The table of expectancy showed 28 9-10 years. The Judge submitted to the jury the proper rule for damages and also left to them the defendant's contention for reductions. The whole controversy before the jury on this issue was in terms of "dollars," not "cents," and the verdict must be construed in that connection.

In *Stevens v. Smith,* 15 N. C., 292, where the plaintiff sued on a note for four hundred and forty-seven dollars and sixty-six cents," this Court held (Gaston, J.) that it was not a variance that by the instrument put in evidence the defendant promised to pay "four hundred and forty-seven and sixty-six cents," saying that the note being for the payment of money, it was payable in our currency, and "dollars" were meant, unless "cents" were named, because the Act of Congress, 2 April, 1792 (now U. S. Compiled Statutes, sec. 3563), makes the dollar the *unit;* that all other coins were recognized as multiples or fractional parts thereof, and that the same was true of our State, Laws 1809, ch. 775, adding, "this note could not be understood by the parties, by a court, or by a jury, in any other sense than as stipulating for the payment of four hundred and forty-seven dollars (or units) and sixty-six cents (or hundredth parts thereof). This case is cited and approved in *State v. Keeter,* 80 N. C., 474.

"The omission of the word 'dollars' in a verdict for a money recovery does not affect the validity of the judgment, when it is manifest that dollars were meant, though it would be more regular to amend the verdict before judgment." *Hopkins v. Orr,* 110 U. S., 513; *Parks v. Turner,* 12 How., 39; *Beall v. Territory,* 1 N. M., 519; *R. R. v. Fink,* 4 Tex. Civ. App., 269. "From the earliest period the courts have freely exercised the power of amending verdicts so as to correct manifest errors, both of form and of substance, to make them conform to the intention of the jury." 2 Thompson Trials, sec. 2642, and cases cited.

Of course, if the verdict had been returned in open court, the Judge should and doubtless would have called the omission of the word "dollars" to the attention of the jury. *State v. Godwin,* 138 N. C., 585. But we learn that, by consent, the verdict was rendered to the Clerk. If the matter had been called to the attention of the Judge, on the reassembling of the Court, he would have called the jury together. *Petty v. Rousseau,* 94 N. C., 362, and cases there cited. But they may have dispersed. At any rate the matter does not appear to have been called to the attention of the Judge by exception in apt time, nor indeed at all. The case is presented here simply by the appeal and assignment of error, both of which could have been entered at any time within ten days after Court had adjourned.

In view of the pleadings, the evidence, the nature of the case, the contentions of the parties as arrayed by the Judge in his charge, his instructions to the jury and the absence of any exception in apt time, it would be "sticking in the bark," indeed, to hold that the verdict was not meant to be expressed in dollars.

Affirmed.

C. A. BRAY v. J. N. STAPLES et al.

(Filed 11 November, 1908).

1. **Arbitration—Appointment of Third Arbitrator—Notice to Parties—Hearing—Invalid Award.**

When parties submit a matter in controversy to the decision of two arbitrators, with power, in case of disagreement, to call in a third arbitrator, they must, in the absence of an agreement to the contrary, be notified of the appointment of the third arbitrator, the time and place of meeting to determine the controversy, with an opportunity to introduce their evidence and submit arguments as in the original hearing, and failure to give such notice and hear the testimony will invalidate the award at the instance of either party to the controversy.

2. **Same—Instructions.**

It appearing from the uncontradicted evidence that no notice was given of the selection of the third arbitrator, and that he heard no evidence or argument otherwise, than as repeated to him by the original arbitrators, his Honor correctly instructed the jury to answer the issue setting aside the award.

3. **Same—Payment.**

In this case, the part payment made by the original receiver, did not validate the award or prevent his successor from having it set aside.

ACTION tried before *Ferguson, J.*, and a jury, June Term, 1906, of GUILFORD.

The facts necessary to a disposition of this appeal are: In an action pending in the Superior Court of Guilford County, A. L. Brooks, Esq., was duly appointed receiver of the estate of B. F. Fisher, deceased. In the discharge of his duties, it became necessary for him to settle with the defendant, John N. Staples, a claim presented by said defendant against the estate of said Fisher, for professional services rendered said Fisher prior to his death. For the purpose of fixing the amount due said defendant, the receiver, with the assent of Mrs. Isabelle Fisher in her capacity of administratrix and individually, and said John N. Staples, entered into an agreement in writing to submit the question "as to the amount said Staples is entitled to as counsel for the said Fisher," in certain litigation referred to, "and as counsel for Isabelle Fisher and her children after the death of said Fisher," to Clement Manly, Esq., and Judge R. C. Strudwick, "and in the event the said Manly and Strudwick cannot agree upon the amount, they are empowered to choose a third arbitrator, and the award of a majority of them shall be the amount to which the said Staples shall be entitled." This agreement, bearing date April 12, 1906, is signed by the receiver, Colonel Staples, and by Mrs. Fisher. Pursuant to said agreement, the arbitrators met and heard testimony, examined papers, etc., submitted to them. One of them took notes of the evidence. After hearing the evidence and examining the papers, they failed to agree upon an award. Pursuant to the power conferred upon them they selected R. B. Reid, Esq., as "a third arbitrator." Mr. Reid met with other arbitrators at a time and place agreed upon. No notice was given the said receiver, Colonel Staples, or Mrs. Fisher of said meeting, or the time and place thereof. The two original arbitrators agreed that, as they had heard all of the evidence, they would state the same to Mr. Reid, in the presence of each other. This was done, and an award was concurred in by Mr. Manly and Mr. Reid, to which Judge Strudwick declined to assent. The award fixing the amount to be paid Colonel Staples was drawn up and signed by Mr. Manly and Mr. Reid, 18 April, 1908. Mr. Brooks, the receiver, before receiving notice of the award, through his partner paid a portion of the amount awarded to be due Colonel Staples. The plaintiff was, by order of the Court, substituted as receiver in the place of Mr. Brooks, and brings this action to set aside the award for that no notice was given to the parties of the time and place of the meeting of the arbitrators, after the selection of Mr. Reid as third arbitrator, and that Mr. Reid did not hear the evidence upon which he joined in the award. Defendant Staples contended that the award was valid and, if not so, that it had been ratified by Brooks, receiver. The case was brought to trial and, upon the issue directed to the validity of the award, his Honor charged the jury that, if they believed the evidence, they should answer the issue "No," and as to the issue in regard to the alleged ratification, that Brooks, receiver, had no power after June Term, 1906, to ratify the award, and there was no evidence of any ratification. The jury answered the issue as instructed, and judgment was rendered setting aside and vacating the award. To all of which defendant Staples duly excepted. He asked the Court to instruct the jury, if they believed the evidence, to answer the issue "Yes." To the refusal to do so he excepted and appealed, assigning as error the refusal of the Court to instruct the jury as requested, and the instructions given.

Stedman & Cook, Justice & Broadhurst and *King & Kimball* for plaintiff.

J. A. Barringer and *Wm. P. Bynum* for defendant.

CONNOR, J., after stating the case: The right of the plaintiff to the relief demanded and the ruling of his Honor depend upon the answer to questions in regard to which there is no conflicting evidence. Does the failure of the arbitrators to notify the parties of the appointment of Mr. Reid as "third arbitrator," and of the time and place of their meeting with him to finally hear and determine the matters submitted to them, and the failure of Mr. Reid to hear the evidence from the witnesses, invalidate the award? The question does not appear to have been decided by this Court. In Russell on Arbitration, 3rd Ed., 320, cited with approval in *Gaffy v. Bridge Co.,* 42 Conn., 143, it is said that it is the duty of the umpire to re-examine such witnesses as the parties choose to produce, and as to such points as they choose to raise, although the same witnesses have been examined as to the same points before the arbitrators. He may not take the evidence, or any part of it, from the notes of the arbitrators, unless there be a special provision in the submission, or a clear agreement between the parties permitting such a course. In *Thomas v. R. R.,* 21 N. J., Eq., 567, it is said: "When the new arbitrator was chosen the complainant had the right to adduce additional testimony and additional arguments and that, unless the right was clearly waived by their agreement or conduct, notice of the appointment of a third arbitrator, and opportunity to be heard, were essential preliminaries to a valid award. This doctrine is founded in natural justice and is not denied to be law." *Elemdorf v. Harriss,* 23 Wend., 628, 35 Am. Dec., 587; *Alexander v. Cunningham,* 111 Ill., 511; *Day v. Hammond,* 57 N. Y., 479, 15 Am. Rep., 522, in which it is said: "Parties are always entitled to a hearing before arbitrators, unless that hearing is waived, and if an umpire or other arbitrator is called in, in case of a disagreement, the same rule, as to a right of hearing, applies. The waiver of the right must be distinct and unequivocal." In a well considered opinion reviewing the authorities, *Keith, P.,* says: "We deduce from the authorities the general rule that when two arbitrators who differ, have the power to appoint a third, who shall have authority to decide between them, it is necessary to inform the parties in interest of his appointment, give them a reasonable opportunity to produce evidence before them, touching the matters in controversy." *Coons v. Coons,* 69 Va., 434, 64 Am. St. Rep., 804. In 3 Cyc., 660, the editor says that, after a disagreement between the original arbitrators, the special arbitrator, acting with them or upon his sole responsibility, may proceed to a consideration of the case as presented by the original arbitrators and make an award thereon without hearing the evidence anew or additional evidence, unless such rehearing be specially requested by one of the parties or required by the terms of the submission, but he further says this rule does not apply unless the parties have been notified of the appointment of the special arbitrator or umpire, and of the proceedings by him, and have been accorded reasonable opportunity to make such demand. In the note he says: "In the absence of such notice and opportunity to be heard or to demand a re-hearing, no authority to proceed exists," citing numerous cases. Some distinction has been made between the duty and power of an umpire and a "third arbitrator." It is unnecessary to consider this question because Mr. Reid was, by the terms of the submission, made "third arbitrator" and comes clearly within the decisions cited. Whether the award may be attacked for failure to give the notice and hear the evidence by the third arbitrator, collaterally, or only by a direct proceeding to set it aside, is not presented upon this appeal. This is a direct proceeding for that purpose. It is insisted that, however the question may have been decided in other jurisdictions, this Court in *Zell v. Johnston,* 76 N. C., 302, held the award valid. In that case Judge Rodman puts the decision on the ground that, conceding the rule as to notice, when the parties have presented their claims and evidence, they are not entitled to notice of the time when the arbitrators will meet to consider and dispose of the case. He also says that the defendant clearly waived any other notice than he had. The decision is not in conflict with the uniform current of decisions on the question in other jurisdictions.

His Honor's instruction on the first issue was clearly correct. We find no evidence of a ratification by the receiver, if it be conceded that he had the power to ratify, which is very doubtful. We concur with his Honor's instruction in that respect. It is conceded by all parties that the arbitrators, and each of them, acted in good faith and no suggestion is made to the contrary. They inadvertently overlooked the necessity of notifying the parties of Mr. Reid's appointment and the time and place of their meeting to determine the matter submitted to them. We think that their course in that respect was in accordance with the custom with us, but the uniform current of authority is that notice must be given of the selection of the third arbitrator or umpire, and that the rule is founded in wisdom. Its observance secures to the parties an opportunity to present their evidence and arguments to the final arbiter of their rights and tends to secure acquiescence in this mode of trial favored by the law, because it is inexpensive, expeditious and usually works substantial justice. The gentlemen who consented to act as "third arbitrators" were doubtless discharging "a friendly office," without compensation.

The judgment of his Honor, for the reasons assigned, was correct. The other exceptions in the record are immaterial in the view which we take of the case. Of course, the parties and their rights, in respect to the subject matter of the arbitration, are not affected by the award or the judgment setting it aside. They are relegated to their original status.

It may be well enough to say that the form of his Honor's instruction to the jury does not conform to many decisions of this Court, but as there was no contradictory testimony and no inference to be drawn from it, contrary to the legal conclusion stated by his Honor, no harm could come to defendant. The judgment must be

Affirmed.

N. A. McKEITHEN v. N. A. BLUE.

(Filed 11 November, 1908).

1. **Execution, Issuance of—Requisites.**

It is necessary for the issuance of an execution that it be actually or constructively delivered to the sheriff, and when it is made out, but not sent out of or issued from the Clerk's office, and memorandum of "execution" is entered on the docket, it is not sufficient, under Revisal, sec. 619, and does not prevent the judgment from becoming dormant.

2. **Judgments, Dormant—Execution Defective—Procedure—Motions.**

A dormant judgment is not affected by executions made out by, but not issued from, the Clerk's office; and it is open to defendant to move before the Clerk, or before the Superior Court on appeal, that the judgment be declared dormant and that all such executions be recalled, for the reason that no executions had, in fact, been issued.

3. **Judgments, Dormant—Execution Defective—Irregularity—Sale—Innocent Purchaser, etc.**

Failure to have given to the judgment defendant notice of an execution issued under a dormant judgment is only an irregularity, and does not invalidate a deed to lands, sold under the execution, made to an innocent purchaser for value, without notice of the irregularity.

4. **Execution—Issuance—Time to Issue—Notice—Statutes.**

Under Revisal, 1905, secs. 619, 620, authorizing a party to proceed to enforce a judgment by execution within three years, and requiring notice to defendant before issuance of execution, where no execution has been issued within three years, the issuance of an execution after three years without notice is only an irregularity, and a sale without objection gives to a stranger, purchasing without notice, title to the property.

5. **Execution—Issuance—Irregularity—Waiver.**

Where a judgment defendant appeared before the Superior Court in homestead appraisement proceedings and moved to set the same aside on the ground that he had not been notified of the time or place of appraisement, without asserting that the execution was defective, he waived the irregularity that it was issued without notice to him, as required by Revisal 1905, sec. 620.

ACTION heard by *Jones, J.*, January Term, 1908, of MOORE. Defendant appealed.

U. L. Spence, W. J. Adams and *T. H. Calvert* for plaintiff.

J. McN. Johnson, J. W. Hinsdale, Jr., and *H. F. Seawell* for defendant.

HOKE, J. The facts relevant to this controversy seem to be that, in 1896, plaintiff obtained a judgment against defendant for the sum of $610, and some interest, and same was duly docketed in Moore County on February 27, 1896.

From the entry in the Clerk's docket in said county, it appeared that executions were issued on this judgment at regular intervals, and within three years of each other, until Dec. 30, 1905, when a final execution issued and was placed in the hands of the sheriff of said county, who proceeded to summons appraisers to lay off and allot defendant his homestead, as required by law. These appraisers allotted said homestead, finding an excess, and made return of their action pursuant to the statute. Thereupon, defendant filed exceptions to said allotment, claiming that same was made in his absence, and without any notice to him of such proceedings. The exception was, in effect, overruled by the Judge on a hearing had, and defendant appealed to this Court.

On such appeal it was held that substantial wrong had been done defendant in allotting his homestead without giving him proper notice and opportunity to be present, and that the same amounted to reversible error, and should be corrected. See *McKeithen v. Blue,* 142 N. C., 360. This opinion having been properly certified down, the matter came on for hearing at May Term, 1907, of the Superior Court, before his Honor Peebles, J., when defendant, by his attorneys, moved in effect, that the judgment be declared dormant and all executions therein be recalled, for that no executions had in fact issued on said judgment previous to that of December 30, 1905, since the rendition of the judgment, but that same had only been filled out by the Clerk and filed in his office as memorandum, made on docket, execution, etc., from time to time, as indicated in the record, but that same had never been delivered to the Sheriff, or other executive officer, nor to any one for them.

His Honor, Judge Peebles, declined to consider this motion or suggestion, holding that the same was not relevant to any proceedings before him, and entered judgment pursuant to the opinion of the Supreme Court, setting aside the appraisement, and appointing three commissioners to reallot the homestead. A writ therefore issued, the homestead was reallotted, finding no excess of property subject to sale, and return made to Court, and defendant filed exceptions to this reallotment, alleging various irregularities in the proceedings. In the meantime the defendant moved before the Clerk to declare the judgment dormant and to recall all executions issued on same, which was heard before the Clerk in August, 1907, when judgment was rendered denying the motion, and defendant excepted and appealed to the Judge.

The cause then came on for hearing, as stated, before his Honor, Jones, J., at January Term of the Superior Court, and was heard and determined both on the exceptions entered to the reallotment of the homestead, made pursuant to Judge Peebles' order, and on the appeal from the judgment of the Clerk, refusing to declare the judgment dormant, and on the hearing before his Honor, he affirmed in all things the proceedings had reallotting the homestead and the judgment of the Clerk, and defendant, as stated, appealed to this Court.

Both the Clerk and the Judge find that the executions purporting to have been issued previous to that of December 30, 1905, were not sent out of the Clerk's office, or issued therefrom, but were only filled up by him and memorandum of "execution" made on the docket as indicated. On this statement and finding, the authorities are to the effect that this was no sufficient or proper issuing of an execution, as contemplated and required by the statute to prevent, and the judgment was therefore dormant at the time the execution was issued, on 30 December, 1905, and being the one under which the defendant's homestead was first allotted. *Webster v. Sharp,* 116 N. C., 466; 8 Ency. Pl. & Pr., 433.

In this last citation it is said:

"The writ while it remains in the Clerk's office is not issued, but it must be actually or constructively delivered to the sheriff before it can be properly said to have been sued out with intent to have it executed."

This being the correct position, we are inclined to the opinion that it would be open to defendant to make his motion either before the Clerk, as he did, or before the Superior Court on the rehearing of the appraisement, as he endeavored to do; for we do not think that there is anything in the former opinion of the Court which conclusively forbids such a course. But, notwithstanding this, we are of opinion that no reversible error appears in the record to the defendant's prejudice, for the reason that there is no claim on the part of defendant nor evidence tending to show that he or any one else has paid the judgment, or any part of it, and there is therefore no substantial merit in his application. For the judgment though dormant was not dead, and while the statute addressed to this question, Revisal, secs. 619-620, requires that notice be issued to defendant before leave of execution shall be allowed, when there has been no execution issued within three years next preceding the application, as a matter of fact, the Clerk did issue the execution of 30 December, 1905, and his having done so without notice, is very generally held to have been at most an irregularity. If there had been no objection made and the officers had proceeded to sell the excess found in the first appraisement, a stranger purchasing without notice would have acquired the title. *Lytle v. Lytle,* 94 N. C., 683.

The execution, therefore, though issued without notice, was in no sense a nullity, and defendant having appeared before the Superior Court in the appraisement proceedings and moved to set the same aside for that he was not notified of the time or place of appraisement, and having contested the proceedings under the execution on that ground alone, making no assertion or claim that the execution was in any way defective, and the defect being, as stated, only an irregularity, we are of opinion, and so hold, that this should be considered a waiver of irregularities not specified, and the defendant should not be allowed to repudiate this waiver and avoid its effects, without any assertion or claim of payment or other substantial defense. Process formally issued and acted on, and only defective by reason of irregularities of this character, are not as a rule recalled and the results under it set aside or disturbed on showing that such irregularities existed without more. It is nearly always required that in addition there should be claim or evidence which reasonably tends to establish merit in the application. *Flowers v. King,* 145 N. C., 234; *LeDuc v. Slocomb,* 124 N. C., 347. And we think this is a case which clearly calls for an application of this principle. The plaintiff having a judgment against defendant duly docketed, and with only two months of its existence remaining, and being under the impression from the entries on the Clerk's docket that executions had been issued at regular and proper intervals, caused a final execution to issue, under which defendant's homestead was allotted. On the return of the appraisers, defendant appeared, as he had a right to do, and excepted for that he had not been notified of the time or place when his homestead was allotted. He contested the allotment on this ground alone, and succeeded in having a reallotment of his homestead, all the time recognizing the validity of the execution. And we are of opinion, as stated, that in the absence of any claim of payment, or any evidence tending to establish it, and when the life of plaintiff's judgment would have otherwise expired, defendant should not be allowed to change his position and avoid the effect of his waiver.

There is no error in the judgment of the Court below that the reallotment be in all things affirmed, and be registered according to law.

Affirmed.

J. W. SMITH v. C. D. THOMAS et al.

(Filed 11 November, 1908).

Malicious Prosecution—Former Conviction—Confession—Probable Cause.

When a defendant pleads guilty of an offense, tried in a court of a Justice of the Peace, having final jurisdiction, his own confession is conclusive evidence of probable cause, and the maker of the affidavit, upon which the warrant issued, is not liable to him in an action for damages for malicious prosecution, though the defendant was acquitted on appeal in the Superior Court.

ACTION tried before *Jones, J.*, and a jury, May Term, 1908, of ANSON.

This is an action for malicious prosecution. The plaintiff was charged before a Justice of the Peace with the commission of a criminal offense upon the accusation and affidavit of the defendant, C. D. Thomas. At the trial, as the record shows, he pleaded guilty, and afterwards appealed to the Superior Court from the judgment of the Justice, which was reversed by that Court. At the close of the plaintiff's testimony, the Court, on motion of the defendant, entered a judgment of nonsuit against the plaintiff, whereupon he excepted and appealed.

J. W. Gulledge for plaintiff.

Robinson & Caudle, J. A. Lockhart and *H. H. McLendon* for defendant.

WALKER, J., after stating the case: The reason for the decision of the Court below was, that the plaintiff had been convicted, upon his own confession of guilt, by the Justice, and that the conviction was conclusive evidence of probable cause for the prosecution, although it was reversed in the Superior Court. In this ruling we concur with the Judge who presided at the trial in the Superior Court.

However the question may have been decided in the courts of the other States, and their decisions do not appear to have been entirely harmonious, this Court has held, in at least two previous adjudications, that a conviction of the defendant in the criminal prosecution by a Court of competent jurisdiction is conclusive in an action by him for malicious prosecution upon the question of probable cause. It was so held in *Griffis v. Sellars,* 19 N. C., 492. In that case, it is said, in support of the principle, that "as evidence of probable cause, a conviction by verdict and judgment is as convincing, and, therefore, ought in law to be as high and conclusive, although vacated by appeal, as if it stood unreversed and in full force. It sanctions the prosecution in its origin and progress through that court, and is the highest evidence, namely, a judicial sentence of record, that apparently, the accused was guilty. It is true that the law, in its benignity, allows the convict to show on appeal to another Court, that he is really not guilty. But that does not show, nor can it be shown, against the facts of the first verdict and judgment, that there was no just and probable cause of accusation." It is true that Chief Justice Ruffin refers, in the opinion, to a conviction by verdict and judgment, but a trial by jury is not essential to the conclusive effect of the conviction, for the latter word means, in law, the ascertainment of the defendant's guilt by some known legal mode, whether by confession in open court or by the verdict of a jury or, under our Constitution and statute, by the judgment of a Justice of the Peace, where a jury trial is waived, provided the Justice has final jurisdiction of the offense. *Commissioners v. Lockwood,* 109 Mass., 323; *People v. Adams,* 95 Mich., 543; *U. S. v. Watkins,* 6 Fed. Rep., 158;

Egan v. Jones, 32 Pac. Rep., 930. This Court, in *Price v. Stanley,* 128 N. C., 38, has approved the decision in *Griffis v. Sellars,* and expressly holds that the principle, as settled by that case, is applicable to a conviction by a Justice having jurisdiction of the offense, even without a jury trial. The Court says, in regard to a reversal of the conviction: "If by any means a trial had been afterwards had in the Superior Court, and the same had resulted in an acquittal of the plaintiff Price, nevertheless, the conviction in the Justice's court—a Court of competent jurisdiction—established probable cause for the prosecution." The case of *Griffis v. Sellars* was before this Court a second time, it being reported in 20 N. C., at p. 176, and the former decision was approved. "This case differs," says the Court, "from that which was before the Court a year ago between the plaintiff's brother and the same defendant (*ante,* Vol. 2, p. 492), only in showing more explicitly the innocence of the plaintiff, and the malignant motive of the defendant. But the same principle governs both, notwithstanding that difference in the detail of the circumstances. The principle is, that probable cause is judicially ascertained by the verdict of the jury and judgment of the Court thereon, although, upon an appeal, a contrary verdict and judgment be given in a higher court. Our opinion being, that probable cause is judicially established by those means, it follows that no evidence is competent to disprove it." The Court also assigns cogent reasons why the plaintiff in the suit for malicious prosecution should not be permitted to go behind the judgment of conviction for the purpose of showing how it was obtained, or that it was unjust or contrary to law, as the prosecutor should be given the same privilege, in order to offer fuller proof of the defendant's guilt, and the result would be the interminable prosecution of the same litigation between the parties, alternately changing sides. The final conclusion of the Court is stated as follows: "So in the present state of the case another ingredient of the action, namely, the want of probable cause, which is as essential to the plaintiff's action as is his innocence, is completely negatived, because the proof that satisfied the jury and Court then trying the plaintiff that he was guilty, must, upon the ground already adverted to, be deemed by another Court to establish that there was then probable cause. The judgment in the County Court justifies the institution of the prosecution in that Court." Newell, in his work on Malicious Prosecution, at pp. 253, 254, comments with approval on *Griffis v. Sellars,* 19 N. C., 492, and cites cases decided in other States which sustain the same doctrine as therein settled. In Cooley on Torts (2 Ed.), p. 185, we find it stated, that, "if the defendant is convicted in the first instance, and appeals, and is acquitted in the appellate court, the conviction below is conclusive of probable cause." In the comparatively recent case of *Crescent City L. S. Co. v. Butcher's Union, etc, Co.,* 120 U. S., 141, the subject is learnedly discussed with a full citation and consideration of the authorities, and among others, which sustain our conclusion, in this appeal, is cited *Griffis v. Sellars, supra,* as a leading case upon the question. The Court adopts, as correct, the principle declared in that case.

Our decision as to the effect of the conviction of the plaintiff by the Justice in the criminal proceeding against him, makes it unnecessary to consider the other question discussed by counsel, as to whether there was any evidence that the defendant, T. V. Hardison, participated in the prosecution.

No error.

THE HENDERSON-SNYDER COMPANY v. J. A. POLK.

(Filed 19 November, 1908).

1. **Mortgagor and Mortgagee — Illegal Consideration — Evidence — Questions for Jury.**

   When the defense to an action for the possession of personal property, claimed under mortgage by a subsequent purchaser, is that the consideration for the mortgage was the suppression of a criminal prosecution, and there is some evidence tending to show that the withdrawal of the prosecution was an independent transaction, not influenced by the promise to give the note and mortgage, it is sufficient to go to the jury.

2. **Mortgagor and Mortgagee—"Chilling Sale"—Collusion—Evidence—Acts and Declarations of Another—Common Purpose—Evidence—Questions for Jury.**

   Under foreclosure sale made in pursuance of a power contained in a first mortgage, there was evidence tending to show that the mortgagee, acting with full knowledge and consent of his father, the defendant, procured a stranger to bid in the property at the sale, at an inadequate price, by reason of his trying to induce others not to bid, stating that it was a sham sale. The first mortgage debt was paid by defendant, who took possession of the property and sold a part of it at a much greater price, proportionately, than that paid by him under the mortgage sale. In an action for possession of the property remaining in defendant's possession, brought by the second mortgagee. *Held*, (1) The evidence was sufficient to go to the jury upon the question of collusion between defendant and the mortgagee for the purpose of chilling the sale, and causing the property to bring an inadequate price; (2) The acts and declarations of the mortgagor in furtherance of the conspiracy, were competent against the defendant; (3) The evidence was sufficient to sustain a verdict for the plaintiff.

ACTION tried before *Jones, J.*, and a jury, February Term, 1908, of UNION.

This action was brought to recover the possession of a mule. The plaintiff claimed the mule under a mortgage of J. Lee Polk to it, and the defendant under a mortgage from J. Lee Polk of prior date, which conveyed two mules, one of which is the mule in controversy.

The defendant alleged that the note and mortgage, under which the plaintiff claimed, were given to suppress a criminal prosecution and, further, that the two mules had been sold under the senior mortgage at a fair sale and purchased by him. The plaintiff denied that the consideration of the debt and mortgage held by it was the suppression of a criminal prosecution, and alleged that, at the sale under the senior mortgage, there was a fraudulent suppression of biddings for the purpose of defeating its rights under the junior mortgage. The issues submitted to the jury, with the answers thereto, were as follows:

1. Was the agreement to *nol pros* the criminal prosecution against J. Lee Polk any part of the consideration in execution of the note and mortgage sued on? Answer: No.

2. Was the bidding at the sale by the mortgagee, J. F. Doster, chilled and suppressed by the conduct of J. Lee Polk, with the knowledge and consent of J. A. Polk, and did the defendant J. A. Polk purchase the property sold at an inadequate price? Answer: Yes.

3. What was the value of said mules on the day of sale? Answer: $250.

4. Is plaintiff the owner of and entitled to the possession of the mule described in the pleadings? Answer: Yes.

5. What is the value of said mule? Answer: $125.

The defendant, in apt time, requested the Court to instruct the jury as follows:

1. There is no evidence from which the jury can find that the defendant J. A. Polk did anything or used any words calculated to chill or stifle biddings at the said sale (under the senior mortgage), and the jury should answer the second issue "No."

2. If the jury believe the evidence, they should answer the first issue "Yes."

The Court refused to give either of the instructions, and the defendant excepted. The defendant objected to the submission of the second issue, the objection was overruled and the defendant excepted. Judgment was rendered upon the verdict for the plaintiff, and the defendant appealed. The other facts are stated in the opinion of the Court.

Redwine & Sikes for defendant.
No counsel for plaintiff.

WALKER, J., after stating the case: We have carefully examined the testimony in this case, and think there was at least some evidence that the plaintiff's mortgage was not given to procure the withdrawal of the criminal prosecution, or, in other words, that the suppression of the prosecution was not the consideration of the debt and the mortgage securing its payment. There was some evidence tending to show that the withdrawal of the prosecution was an independent transaction, not influenced by the promise to give the note and mortgage. The evidence may have been slight, but it was fit for the consideration of the jury, in our opinion.

The defendants objected to the evidence as to the declarations of J. Lee Polk, as to the suppression of biddings at the sale under the senior mortgage, upon the ground that it was hearsay and, therefore, not competent against J. A. Polk, but the evidence tends to show that J. Lee Polk and J. A. Polk, the latter being the father of the former, were acting together in making the sale, the mortgagee, J. F. Doster, having little or nothing to do with it. There were facts and circumstances the jury might well find to have existed, and relations and conduct of the parties which tend to show that the sale was not a fair one, but that J. Lee Polk and J. A. Polk had conspired for the purpose of having the property sold at an undervalue, so as to defeat the plaintiff's rights under his mortgage. This made competent the acts and declarations of J. Lee Polk in furtherance of the common design. The jury found that it was a collusive sale, and upon evidence, as we think, which justified the finding. That

J. Lee Polk acted with the full knowledge and consent of the defendant in all he did, with respect to the sale, seems to be clearly shown by the evidence. J. Lee Polk procured the bidder, a stranger who had no interest in the matter, but who really acted in the interest of J. A. Polk at the request of J. Lee Polk. The property sold was worth two hundred and fifty dollars and was bought at the sale for one hundred dollars and J. F. Doster's debt of seventy-five dollars was paid. J. A. Polk afterwards sold one of the mules for one hundred and twenty-five dollars, retaining the other one. There were other facts shown which tended to establish a common purpose to make a sham sale, and that it was understood how the illegal sale should be effected. "Where two persons are engaged together in the furtherance of a common design to defraud others, the declarations of each relating to the enterprise are evidence against the other, though made in the latter's absence." *Lincoln v. Chaflin,* 7 Wallace, 132. Judge Elliott thus states the rule in such cases: "It is, perhaps, the universal rule, that any act done, or any declaration made, by any one of the conspirators in the furtherance or perpetration of the alleged conspiracy may be given in evidence against himself or his co-conspirators. This rule has been more aptly stated as follows: 'The law undoubtedly is, that where two or more persons combine or associate together for the prosecution of some fraudulent or illegal purpose, any act or declaration made by one of them in furtherance of the common object, and forming a part of the *res gestae,* may be given in evidence against the other.' Of this rule the Supreme Court of Indiana said: 'The principle on which the acts and declarations of other conspirators, and acts done at different times, are admitted in evidence against the persons prosecuted is that, by the act of conspiring together, the conspirators have jointly assumed to themselves, as a body, the attribute of individuality, so far as regards the prosecution of the common design, thus rendering whatever is done or said by any one, in furtherance of that design, a part of the *res gestae,* and, therefore, the act of all.' Substantially the same rule applies in criminal as in civil cases as to the admissibility of the acts or declarations of one conspirator as original evidence against each member of the conspiracy." 4 Elliott on Evidence, sec. 2939, citing *Card v. State,* 109 Ind., 415. See also *Cuyler v. McCartney,* 40 N. Y., 221; *State v. George,* 29 N. C., 327; *Cabiness v. Martin,* 15 N. C., at p. 110.

What J. Lee Polk said at the sale was calculated to deter others from bidding and to depress the price of the property. In express words, he tried to induce others not to bid, stating that it was a sham sale. "A sale at auction is a sale to the highest bidder, its object a fair price, its means competition. Any agreement to stifle competition is a fraud upon the principles on which the sale is founded." *Smith v. Greenlee,* 13 N. C., 126; *Davis v. Keen,* 142 N. C., 496.

We have found no reversible error in the other rulings of the Court to which the defendant excepted.

No error.

E. J. HALL, Administrator, v. SOUTHERN R. R. COMPANY.

(Filed 19 November, 1908).

1. **Executors and Administrators—Death by Wrongful Act—Foreign Administrators—Subsequent Qualification—Time for Bringing Suit.**

   The action given by Revisal, sec. 59, to executors or administrators of the person whose death is caused by the wrongful act, etc., of another person, duly qualifying here, is not available to a foreign administrator or to an administrator who has since qualified here, after the commencement of the suit and the expiration of one year from the death of his intestate, which occurred in this State.

2. **Executors and Administrators—Death by Wrongful Act—Procedure—When Suit Deemed to be Commenced.**

When a suit by a foreign administrator, under Revisal, sec. 59, has been dismissed, and he has subsequently qualified as administrator here, his further proceeding to recover damages for the wrongful act causing the death of his intestate, should be by a separate and independent action; but when he has been permitted by the trial Court, without objection, to become a party to the original suit and amend his pleadings to meet the changed conditions in this respect, his action will be deemed as commenced when he was made a party. (*Hall v. R. R.*, 146 N. C., 345, cited and approved).

ACTION heard upon demurrer to complaint, by *Jones, J.*, August Term, 1908, of PERSON. Plaintiff appealed.

B. S. Royster and *E. P. Buford* for plaintiff.

W. B. Adams, A. B. Andrews, Jr., and *P. H. Busbee* for defendant.

WALKER, J. This case was before us at the Fall Term, 1907, and is reported in 146 N. C., 345. We then dismissed the appeal of the defendant, as having been improperly taken, but intimated that the plaintiff could not maintain this action. The plaintiff, who had qualified as administrator in the State of Virginia, brought this suit to recover damages for the negligent killing, in this State, of his intestate by the defendant. Since the decision in the former appeal, the plaintiff has qualified as administrator in this State, and has become a party to this action, and an amended complaint has been filed, stating the fact of his qualification and further alleging that the death of the intestate was caused by the defendant's negligence, the allegations, in this respect, being similar to those of the first complaint. As the plaintiff did not qualify as administrator of the intestate in this State until after the commencement of this suit and the expiration of one year from the death of his intestate, he cannot maintain this action as such administrator. This is settled by the recent decision of the Court in *Gulledge v. R. R.*, 147 N. C., 234; approving

Best v. Kinston, 106 N. C., 205; *Taylor v. Cranberry Co.,* 94 N. C., 526; *Roberts v. Insurance Co.,* 118 N. C., 434; and *Tayloe v. Parker,* 137 N. C., 418. See also *Gulledge v. R. R.,* at this term (on rehearing), where the question is fully considered by Justice Brown, with a full citation of the authorities. The action by the plaintiff as administrator, qualified in this State, is deemed to have been commenced when he was made a party to the action as such and joined in the amended complaint. *Hester v. Mullen,* 107 N. C., 724. Indeed, the Court should not have allowed the amendment, but the plaintiff, under his qualification as administrator in this State, should have been required to bring a separate and independent action.

The plaintiff contends, however, that he is entitled to recover in his capacity as administrator, by virtue of his qualification in Virginia. We adhere to the opinion expressed in the former appeal, that, by virtue of his qualification in Virginia, the plaintiff cannot maintain this action. The statute, under which this suit was brought, is, of course, not penal, but remedial in its nature, and we should give it such a construction as will effectuate the intention of the Legislature in enacting it. It creates a new cause of action, not existing at the common law, and allows damages for the death of a person which is caused by the wrongful act, neglect or default of another, but requires that the action shall be brought by the executor, administrator or collector of the decedent. Can it be that this refers to a foreign administrator? We think not, but that the reference is to a representative appointed by a local Court. *Vance v. R. R.,* 138 N. C., 460; *Hartness v. Pharr,* 133 N. C., 566. In the absence of any intimation to the contrary, this is the clear meaning of the statute, and we think that it has been regarded as the true construction of similar statutes by the Courts of other States. In *Neill v. Wilson,* 146 N. C., 242, we held that Revisal, sec. 59, by which a cause of action is given for the death of a person caused by a wrongful or negligent act, impresses upon the right of action the character of property for the purpose only of distribution here, under the provisions of the statute in cases of intestacy, and that the rights of the beneficiaries should be determined as of the time of the testator's death. It is no part of the estate, as assets for the purpose of paying debts. *Hartness v. Pharr, supra.*

It is hardly necessary to add much, if anything, to what we said in our former opinion, as we then considered the question fully, citing authorities which we think sustain our position. But as the right of action arises under the statute of this State, where the death occurred, if the meaning of the statute is that an administrator appointed in this State is the only person who can sue, and we so hold, decisions in other States, even if they permit a recovery by a foreign administrator, can be of little aid to us. We have carefully examined the numerous cases cited by Mr. Buford (who evidently prepared his brief with great diligence and argued the case before us with much ability and learning), and we have been able to find none which conflicts with our view of the law. Counsel insisted that the case of *R. R. v. Brantley*, 96 Ky., 297, cited in the former opinion, does not apply to this case. But it will be found, by a careful reading of the opinion, that the Court held the "doctrine to be universal, that an administrator, appointed in a foreign State, can maintain no action in another State, unless authorized by statute, and if there is no authority given the foreign administrator to sue here (in Kentucky) in such a case as the one presented, the general demurrer should have been sustained," and, secondly, that the statute of that State authorizing a foreign administrator to sue for "debts" due the decedent, does not authorize a foreign administrator to prosecute an action for a tort. "The mere right to recover for a tort is not and cannot be regarded as assets to which the foreign administrator has title or the right to convert into a debt by a judgment. This right is denied him by the statute." In *Wooden v. R. R.,* 126 N. Y., 16, relied on by the plaintiff, the Court says: "It is claimed, however, that even in that event the right of action accruing in the place of the transaction can only be enforced in our jurisdiction under our remedial forms, and so should have been brought by the plaintiff not as widow but as administratrix, to which office she has been appointed in this State. But it must not be forgotten that the cause of action sued upon is the cause of action given by the *lex loci,* and vindicated here and in our tribunals upon principles of comity. That cause of action is given to the widow in her own right and as trustee for the children, and we open our courts to enforce it in favor of the party who has it, and not to establish a cause of action under our statute which never in fact arose. We refer to the *lex fori* and measure it by and compare it with the *lex loci,* I think, for two reasons: one, that the party defendant may not be subjected to different and varying responsibilities, and the other, that we may know that we are not lending our tribunals to enforce a right which we do not recognize, and which is against our own public policy; and we do not refer to our law as creating the cause of action which we enforce. It is the cause of action created and arising in Pennsylvania which our tribunals vindicate upon principles of comity, and, therefore, must be prosecuted here in the name of the party to whom alone belongs the right of action." It appears in *Brown v. R. R.,* 97 Ky., 228, which we have already cited, that a previous action had been brought in Kentucky by the foreign administrator of the person who was killed in that State by the defendant's negligent act, and was dismissed by the Court upon the ground that a foreign administrator could not sue, on a demand of this kind, under the statute in Kentucky. We have not been able to find a case like the one at bar, in which a foreign administrator was permitted to sue in a court of a State where there was no statute permitting him to do so. The Indiana cases are decided upon a construction of the statute of that State allowing foreign administrators to sue in its courts.

Whether, if the death had occurred in Virginia, the plaintiff, as a foreign administrator, could have sued the defendant in our courts, under the statute of Virginia, assuming that it is substantially like ours, is a question which is not before us now.

The defendant demurred to the complaint as amended, the demurrer was sustained and the action dismissed. In this ruling of the Court we concur.

Affirmed.

D. S. DAVIS v. A. J. STEPHENSON.

(Filed 19 November, 1908).

1. **Instructions—Facts Assumed—Contentions—Questions for Jury.**
   A "contention," under conflicting evidence, made during the trial of an action brought upon account, that an account had been rendered and kept a reasonable time without objection, cannot be made a basis of exception to the refusal of the Judge to charge accordingly. (1) It assumes the facts as to the absence of objection and the reasonableness of the time the account was kept; (2) It does not meet the requirements of a request for instructions.

2. **Appeal and Error—Judge's Charge Assumed to be Correct.**
   When it is stated in the record that the Court called the jury's attention to a matter, or had instructed upon it, the charge thereon is assumed to be correct on appeal, when it is not set out in the case.

3. **Instructions—Account Stated—Acceptance—Questions for Jury.**
   Upon conflicting evidence, in a suit brought upon an account, it was not error to plaintiff's prejudice for the Judge to charge the jury there would be no legal presumption that the account was presented and accepted by defendant, and should the jury find that it had been presented and accepted, it would devolve upon the defendant to pay it.

4. **Evidence—Account Stated—Correctness—Habitual Drunkenness.** Evidence that the one suing on an account stated was in the habit of drinking liquor excessively, is competent for the purpose of showing that he was not qualified to transact business or to keep accounts correctly.

ACTION tried before *Long, J.*, and a jury, August Term, 1908, of UNION.

This action was brought to recover the amount of an account for goods sold and delivered to the defendant, cash advanced and money paid for him at his request, the amount claimed by the plaintiff being one hundred and seventy-one 75-100 dollars. There were two accounts, one for $128.59 and the other for $43.16. The defendant denied his liability and set up a counterclaim for $39.08. The issues submitted, with the answers thereto, were as follows:

1. In what amount, if any, is the defendant indebted to the plaintiff? Answer: None.

2. In what amount, if any, is the plaintiff indebted to the defendant on his counterclaim? Answer: $10.

There was a motion by the plaintiff for a new trial, which was overruled. Judgment was entered upon the verdict for the defendant, and the plaintiff appealed.

A. M. Stack for plaintiff.
Williams & Lemmond for defendant.

WALKER, J., after stating the case: There was evidence in support of the contentions of the respective parties. The plaintiff contended, during the course of the trial, that the account for $128.59 had been rendered to the defendant, that he kept it a reasonable time and failed to object to it, and it thereby became an account stated, and he now complains and excepts because the Court refused to charge in accordance with that contention. There are two reasons why this exception cannot be sustained. In the "contention," as it is called, the plaintiff assumes as a fact that the account was rendered and there was no objection to it within a reasonable time. There was evidence, and very strong evidence, it may be conceded, of the fact, but it was for the jury to find the fact from all the evidence. The second reason is, that there was no request for an instruction, and a mere "contention" of counsel during the trial cannot be regarded as a compliance with the statute. But it is stated in the record that the Court had "called the attention" of the jury to this matter, that is, had instructed them about it, and we must assume here that the instruction was correct, when it is not set out in the case. The Court then proceeded to charge the jury as follows: "The plaintiff insists, that if there was the statement of account submitted to the defendant, which he promised to pay—if that is so, that would establish that $128.59. If he assented to it, he would be obliged to pay it. There would be no presumption of law about it. If it was submitted to him, and accepted by him, it would devolve upon him to pay it. That is one of the contentions between plaintiff and defendant. Plaintiff says it was submitted to him, and he agreed to pay it. The defendant says it is not so; it was not submitted to him, and was not agreed to by him." To this instruction the plaintiff excepted.

We can see no inherent error in this instruction. Indeed, the Court charged the jury in accordance with the plaintiff's contention, as it is stated by the Court in that part of the charge we have quoted.

If the account was presented for $129.76 and a demand made for that amount, as stated in the defendant's "contention," and of which there was evidence in the case, it was incorrect, as the amount now appears to be only $128.59. Besides, the defendant did dispute the account and asked for a settlement as soon as he could find the plaintiff sober and in a condition to transact business.

It is true, that "when an account rendered is not objected to in a reasonable time, the failure to object will be regarded as an admission of (or assent to) its correctness, by the party charged." *Hawkins v. Long,* 74 N. C., 782; *Daniel v. Whitfield,* 44 N. C., 297; *Wiggins v. Burkham,* 10 Wall., 129. In *Webb v. Chambers,* 25 N. C., 374, *Ruffin, C. J.,* thus states the rule: "There can be no doubt of the correctness of the opinion given to the jury. It is the ordinary evidence of the justice of a merchant's account, when he renders it to his customer and the latter keeps it without objection to any of its items. Without a denial of it *in toto* or some part of it, the jury may infer an admission of its correctness and a promise to pay the balance." It is expressed in *Gooch v. Vaughn,* 92 N. C., 617, as follows: "The account rendered, and the long delay in objecting to it on account of suggested errors therein, do not necessarily conclude Gooch. The strong presumption is that he examined and accepted it as correct, and he is bound by it, and it ought not to be disturbed, unless he shall allege and prove some substantial error, mistake, omission or fraud vitiating it. This he has the right to do, if he can, and in case of success, to have just correction made. The burden is on him to prove such allegation." But however the rule is stated we do not think it applies to this case, in view of its facts and circumstances. It also appears that the Court did in fact charge the jury that, if they found from the evidence the defendant had assented to the plaintiff's account as rendered, "he would be obliged to pay it."

We do not see why the evidence, as to the plaintiff's habit of drinking liquor excessively, was not competent and relevant. It was offered for the purpose of showing that the plaintiff was not competent to transact business or to keep the account correctly. The Court admitted it for that purpose alone, and we think it was some evidence for the consideration of the jury upon that question in dispute between the parties. It was competent also for other reasons.

No error.

W. M. COX v. ABERDEEN & ASHEBORO R. R. CO.

(Filed 19 November, 1908).

Negligence—Evidence—Burden of the Issue—Burden of Proof—Instructions.

In an action to recover damages to plaintiff's property alleged to have been negligently caused by sparks emitted from defendant's passing engine, when there was evidence tending to show negligence. *Held*, (1) It was error in the trial Judge to charge the jury, in effect, that if they found the evidence to be true there would be a presumption in law of defendant's negligence, and the burden of proof would be upon defendant to show to the contrary; (2) Plaintiff's evidence made out a *prima facie* case to the extent only of carrying the case to the jury to find whether or not the injury was caused by defendant's negligence; (3) The burden of the issue does not shift from plaintiff, while the burden of proof may do so. (*Winslow v. Hardwood Co.*, 147 N. C., 275, cited and approved).

ACTION tried before *Webb, J.*, and a jury, July Term, 1908, of RANDOLPH. Defendant appealed.

Morehead & Sapp and *Elijah Moffitt* for plaintiff.

J. T. Brittain, Adams, Jerome & Armfield, W. J. Adams and *J. A. Spence* for defendant.

WALKER, J. This action was brought to recover damages for burning the plaintiff's timber. There was a verdict for the plaintiff and judgment was rendered thereon. Defendant appealed. The evidence tended to show that the fire was caused by sparks emitted from one of the defendant's engines. With respect to this evidence, the Court charged the jury as follows: "If you find from the evidence that the fire which injured the plaintiff's property escaped from the defendant's engine, there is a presumption in law of negligence on the part of the defendant in the operation of its train, and in that event, the burden of proof is cast upon the defendant to satisfy you that it was not negligent in the respect complained of." To this instruction exception was duly taken, and we think it was erroneous. It evidently made the impression upon the jury that the emission of the sparks raised a legal presumption of the defendant's liability and shifted the burden of proof to the defendant, in the sense that it had failed to satisfy them that there was no negligence; in other words, that its engine was properly equipped and operated, they should return a verdict for the plaintiff. This charge is not sustained by the decisions of this Court. The presumption is one of fact and not law. Evidence that the sparks were emitted from the engine and that they set fire to the timber, made a *prima facie* case for the plaintiff, but only to the extent of being evidence sufficient to carry the case to the jury and to warrant a verdict in favor of the plaintiff, if the jury should find the ultimate or crucial fact that the fire was caused by the defendant's negligence. In the recent case of *Winslow v. Hardwood Co.,* 147 N. C., 275, we said: "The burden of (establishing) the issue does not shift, but the burden of proof may shift from one party to the other, depending upon the state of the evidence. When the plaintiff introduces testimony in a case of this kind to the effect that the injury to him was caused by the derailment of a train, it is sufficient to carry the case to the jury; but the burden of the issue remains with the plaintiff, though the burden of proof may shift to the defendant in the sense that, if he fails to explain the derailment by proof in the case, either his own or that of the plaintiff, he takes the chance of an adverse verdict, for then the jury may properly conclude that the plaintiff has established the affirmative of the issue as to negligence by the greater weight of the testimony. But the defendant is not required to overcome the case of the plaintiff by a preponderance of the evidence." This fits our case exactly, and distinctly shows the error in the instruction of the Court. Judge Elliott states the general rule which applies in cases of this kind with clearness and accuracy, when he says: "The burden of the issue, that is, the burden of proof in the sense of proving or establishing the issue or case of the party upon whom such burden rests, as distinguished from the burden or duty of going forward and producing evidence, never shifts, but the burden or duty of proceeding or going forward often does shift from one party to the other, and some times back again. Thus, when the actor has gone forward and made a *prima facie* case, the other party is compelled in turn to go forward or lose his case, and in this sense the burden shifts to him. So the burden of going forward may, as to some particular matter, shift again to the first party in response to the call of a *prima facie* case or presumption in favor of the second party. But the party who has not the burden of the issue is not bound to disprove the actor's case by a preponderance of the evidence, for the actor must fail if, upon the whole evidence, he does not have a preponderance, no matter whether it is because the weight of evidence is with the other party or because the scales are equally balanced." 1 Elliott on Evidence, 139. We have approved the rule, as thus stated by Judge Elliott, and notably in *Board of Education v. Makely,* 139 N. C., 31, and *Shepard v. Telegraph Co.,* 143 N. C., 244. The charge of the Court was, we think, contrary to the principle established by those and the following cases: *Overcash v. Electric Co.,* 144 N. C., 572; *Ross v. Cotton Mills,* 140 N. C., 115; *Stewart v. Carpet Co.,* 138 N. C., 60; *Womble v. Grocery Co.,* 135 N. C., 474; *Stanford v. Grocery Co.,* 143 N. C., 419, and *Furniture Co. v. Express Co.,* 144 N. C., 644.

There was, therefore, error in the charge, in the respect indicated, which entitles the defendant to another trial.

New trial.

S. H. VENABLE v. SCHOOL COMMITTEE OF PILOT MOUNTAIN.

(Filed 19 November, 1908).

1. **School Committee—Change of Location of School—Discretion.**
The question of changing the location of a schoolhouse is one vested by statute in the sound discretion of the school committee, and their action therein cannot be restrained by the Courts, unless in violation of some provision of law, or the committee is influenced by improper motives, or there is misconduct on their part.

2. **Same—Evidence.**
An order restraining the action of a school committee in accepting a proposition for a change of site of a schoolhouse in a town, should be dissolved when it is shown to be in accordance with the wishes of a majority of its patrons, and to the best interests of the school. No improper motive or misconduct is evidenced by members of the committee subscribing to the purchase price of the new location, reasonably valued at $400, in exchange for which the old site, reasonably valued at $300, was to be given, as such would, in effect, be a donation of $100 for the purpose of effecting the desired change; or by the fact that a brother of a member of the committee was a part owner of the new site.

ACTION from SURRY, heard on motion to dissolve restraining order, heard before *Jones, J.*, at chambers, in Winston, 14 August, 1908. Plaintiff appealed.

L. M. Swink for plaintiff.
Lindsay Patterson for defendant.

CLARK, C. J. The school building at Pilot Mountain was burnt down. It stood on a four acre lot on the edge of town. A large majority of the citizens (four-fifths) presented a petition to the defendant, asking that the new building be erected near the center of the town, on a lot of one acre, which could be bought for $400. It was proposed to raise the $400 by popular subscription and convey the new lot to the School Committee, provided the latter would convey the old lot to the donors in exchange. The value of the old lot was estimated to be $300, the transaction being practically a contribution of $100 by those desiring a change of site.

Those opposing the change of site procured a temporary restraining order, alleging that three of the defendant board were interested in having the exchange of lots made. On a motion to dissolve the restraining order, the motion was allowed, the Court finding as facts that the site of the school was changed, upon petition of about four-fifths of the citizens of Pilot Mountain, to the new lot near the center of the town, which was bought for $400, to be conveyed to the School Committee in exchange for the old lot; that one member of the School Committee contributed $20 to raising the $400 to buy the new lot, that no other member of the defendant committee contributed, though the brother of one of the others subscribed $75 towards the purchase of the new lot, and the brother of another member subscribed $30, and was owner of part of the new lot which is to be conveyed to the School Committee upon payment for it out of the $400 fund to be raised by the citizens for that purpose.

The Court found as a fact that there was "no fraud or collusion on the part of the committee, and that the members of the defendant committee have no financial interest in the change from the old site to the new, except as above stated, and that the change of sites is in accordance with the wishes of a majority of the patrons of the school and to the best interests of the school."

This is a contest between those favoring and those opposing the removal of the school and rebuilding it on a new site. The rebuilding of the school and the change of site are matters vested by the statute in the sound discretion of the School Committee, and not to be restrained by the courts, unless in violation of some provision of law (*Pickles v. County Board,* at this term) or the committee is influenced by improper motives or there is misconduct on their part. *Smith v. School Trustees,* 141 N. C., 160. The Court below having found that there was no fraud or collusion, that the change of site was in accordance with the wishes of a majority of the patrons of the school and to the best interests of the school, this Court cannot reverse that judgment or interfere with the removal, unless we could find that, upon the evidence or on the facts found, there was fraud or collusion. In a matter of this kind (injunction), we are not bound by the facts found by the Judge, but can review the evidence ourselves.

The Courts are astute to impeach and invalidate any transaction where an official has any personal interest whatever in the matter decided by him. The very "appearance of evil" must be avoided. But here, the fact that the brothers of two of the committee contributed to the purchase of the new site cannot be held *per se* any interest invalidating the action of the board, in the absence of any evidence whatever that they influenced any member of the board. The affidavits for plaintiffs are chiefly as to disadvantages of removal, which is a matter for the defendant. There is nothing to authorize a finding that the old lot was worth more than $300, or that the new lot was worth less than $400, or that any member of the committee had any financial interest whatever in the exchange of lots. In a small town the raising of $400 to buy the new lot could hardly have been possible if every one related to either of the five members of the School Committee was prohibited from contributing. As the new lot conveyed to the School Committee required the raising of $400 cash, and the old lot worth $300 (and there is no evidence or finding impeaching these values) was conveyed in exchange, it cannot be seen how the contribution by one member of the board of $20 towards the purchase of the lot to be donated to the board created any interest invalidating the action of the board. The transaction was practically a sale of the old lot worth $300 for its full value, and the investment of that money and $100 more donated by citizens in the purchase of the new lot at $400, its fair value, or it was the sale of a

$300 lot for $400 cash and its investment in the new lot. The contributor of $20 was not profiting, but giving.

The judgment dissolving the restraining order is

Affirmed.

JOSEPH C. INMAN v. NORTH CAROLINA R. R. CO.

(Filed 19 November, 1908).

1. **Railroads—"Look and Listen"—Obstructed View—Contributory Negligence—Questions for Jury.**

While a person who had voluntarily gone on a railroad track, where the view was unobstructed, and failed to look and listen, cannot recover damages for an injury which would have been avoided by his having done so, when the view is obstructed or other existing facts tend to complicate the matter, the question of contributory negligence may become one for the jury.

2. **Same—Evidence.**

Where there is evidence tending to show that a railroad company has several tracks in a city over which the plaintiff usually went in going to and from his work, and that the view of the track was obstructed, and plaintiff, standing within two paces of the track, having listened for warnings he had a right to expect, but which were not given, stepped upon the track and was injured by defendant's train running at a much greater speed than allowed by the town ordinance, and which was unsafe at the place indicated, the question of contributory negligence is properly submitted to the jury.

3. **Railroads—Ordinances Against Blowing Whistles—Warnings—Ringing Bells.**

When there is a town ordinance preventing the blowing of locomotive whistles within its limits, the bell should be rung continuously where there are numerous tracks. and the conditions and surroundings render the running of trains, continuously, dangerous to pedestrians.

ACTION tried before *Moore, J.*, and a jury, February Term, 1908, of GUILFORD, for personal injury at a railroad crossing, caused by alleged negligence on part of defendant company.

There was evidence tending to show that plaintiff lived on one side, and went to his daily work on the other side, of defendant's railroad, along Spring street, in the city of Greensboro; and that, on 19 February, 1906, in going from dinner to his work, he was injured at the public crossing of said street over the tracks of defendant road; that at the crossing there were several tracks of defendant road, and a side-track to a bobbin factory, this last track terminating a short distance from the crossing; that on the occasion in question, as plaintiff approached the crossing, there were cars on this side-track which obstructed the view in one direction, and a freight train of defendant company was running down one of the tracks in an opposite direction; that plaintiff stopped at the end of these box cars on the siding to allow this freight train to pass, and, as this train was about clear of the crossing, he stepped out on the first track of defendant road, and, as he did so, he was knocked off the track and seriously injured by an engine of defendant company, which approached the crossing from an opposite direction, and running, according to different estimates of plaintiff's witnesses, from twenty to thirty-five miles an hour, and without signals or warnings of any kind, and without any one in a position to see or note the condition of the track, or persons upon it at the crossing; that plaintiff's view along the track in the direction from which the engine approached was obstructed by the cars on the side-track; that plaintiff listened for signals in that direction, and hearing none, either by bell or whistle, he stepped upon the track, a distance of four or five feet, one witness said two steps or a step and a half, from where he started, and, as he put his foot upon the track, the engine was approaching at a distance of fifteen or twenty feet running very fast, and he was struck and injured before he could get out of the way.

An ordinance of the city of Greensboro was also put in evidence, which prohibited trains within the city limits from running at a speed greater than four miles an hour, between north and south switches, and greater than ten miles an hour anywhere within the city limits, or to blow their whistles within the corporate limits. There was evidence on the part of the defendants to the effect that the speed of the engine in question at the time was not more than three miles an hour. That the engineer had given the regular crossing signals, by blowing two long and two short blows, about three hundred feet from the crossing.

The evidence of defendant was further to the effect that the engine was running backwards at the time, and they had no one, by reason of coal piled up on the tender, in position to observe or note the conditions on the crossing, and, as a matter of fact, they did not see or observe the plaintiff, but ran on to the shops, and did not know of the injury till looking back they saw a crowd gathered at the crossing.

On issues submitted, the jury rendered the following verdict:

"1. Was the plaintiff injured by the negligence of the defendant's lessee as alleged in the complaint? Answer: 'Yes.'

"2. Did the plaintiff, by his own negligence, contribute to his injury as alleged in the answer? Answer: 'No.'

"3. What amount of damages, if any, is the plaintiff entitled to recover? Answer: 'Twenty seven hundred and fifty ($2,750) dollars.'"

There was judgment on the verdict for plaintiff, and defendant excepted and appealed.

John A. Barringer for plaintiff.
Wilson & Ferguson for defendant.

HOKE, J., after stating the case: There was ample evidence to justify a verdict for plaintiff on the first issue, and the objection chiefly urged for error is that the Court below declined to charge, as requested to do, in substance, that on his own evidence plaintiff was guilty of contributory negligence, and that, if the jury believed the testimony, they would answer that issue in favor of defendant. But, in our opinion, on the facts presented, the authorities will not sustain defendant's position.

In *Sherrill v. R. R.*, 140 N. C., 252, the Court held: "That while one who approaches a railroad crossing is required to look and listen before entering upon the track, and when he fails in this duty and is injured in consequence, the view being unobstructed, under all ordinary conditions, such person is guilty of contributory negligence. Yet, this obligation to look and listen may, in exceptional cases, be so qualified by facts and attendant circumstances as to require the question of a plaintiff's contributory negligence to be submitted to a jury."

This principle, together with the limitation stated, was again upheld in the case of *Morrow v. R. R.*, 146 N. C., 14, where Mr. Justice Brown quotes with approval from the case of *Lavarenz v. R. R.*, 56 Iowa, 689, as follows: "That a person who voluntarily goes on a railroad track, at a point where there is an unobstructed view of the track, and fails to look and listen for danger, cannot recover for an injury that might have been avoided by so looking and listening; but when the view is obstructed, or other facts exist which tend to complicate the matter, the question of contributory negligence then becomes one for the jury."

This doctrine is in accord with well considered decisions in other jurisdictions, some of them cited in *Sherrill's Case, supra.* Notably, the case of *Lavarenz v. R. R., supra,* and *Jennings v. R. R.*, 112 Mo., 268. And its correct application to the facts presented here, requires that the question of contributory negligence on part of plaintiff should be submitted to the jury. There is doubt on the facts and attendant circumstances of this case, where there are several tracks, with trains constantly moving in both directions and crossings at intervals, if a signal whistle sounded three hundred feet from a crossing should be regarded as adequate warning, even if it had been given as claimed by defendant, and, it will be noted, that the city ordinance, offered in evidence, prohibited the blowing of whistles within the corporate limits, and the lawful and usual warning at such places, therefore, must have been the continuous ringing of a bell as a train or engine approached. The plaintiff then standing at most within two paces of the track, with the view obstructed, and having listened for the warning, he had a right to expect, and which it was the duty of the engineer to give, steps upon the track and is run over by an engine running at a rate far beyond what the city ordinance permits, and far beyond what could be at all justified in such place even if there had been no ordinance.

The facts relevant to this especial feature of the case are not unlike those of *Alexander v. R. R.,* 112 N. C., 720, in which a recovery by the plaintiff was sustained, and similar decisions have been made in other cases of like import. See *Hinkle's Case,* 109 N. C., 472; *Norton's Case,* 122 N. C., 910.

There was no error, therefore, in submitting the question of contributory negligence to the consideration of the jury, and the judgment below will be affirmed.

No error.

EVA ROSENTHAL v. CITY OF GOLDSBORO.

(Filed 19 November, 1908).

1. **Municipal Corporations—Discretionary Powers—Public Welfare—Shade Trees—Condemnation Proceedings.**

   The Courts will not interfere with the exercise of discretionary powers conferred upon municipal corporations for the public welfare, unless their action should be clearly so unreasonable as to amount to an oppressive and manifest abuse of their discretion; and, when in the exercise of their proper discretion, the authorities order shade trees along the sidewalks in front of a citizen's residence to be cut down to the injury of his property, for the preservation of the city sewerage, a restraining order should not be granted. (*Tate v. Greensboro*, 114 N. C., 392, cited and applied).

2. **Municipal Corporations—Discretionary Powers—Public Welfare—Condemnation Proceedings—Shade Trees—Notice—Damnum Absque Injuria.**

   When a municipality, within the proper exercise of its discretionary powers, conferred upon them for the welfare of the public, condemn the trees on the sidewalk in front of the property of the citizen, no legal right of the citizen is infringed upon, and no previous notice to him is required. The injury, if any suffered by him, is *damnum absque injuria.* (*Brown v. Electric Co.*, 138 N. C., 533, cited and distinguished).

ACTION heard before *Guion, J.*, on case agreed, June Term, 1908, of WAYNE, to restrain the defendant from cutting down certain shade trees on the streets and sidewalks, within the corporate limits of the city of Goldsboro.

It appeared that the city authorities, in charge and control of the matter, having concluded that the roots from certain shade trees along the streets of the city obstructed and threatened the safety of the city sewerage, ordered removal of the trees, and, thereupon, the plaintiff, owning and occupying a residence abutting on the streets, and which would be injuriously affected by the execution of the order, instituted the present suit to restrain the contemplated removal.

From the facts stated in the pleadings, and admitted by the parties in open court, it appeared:

"This cause coming on to be heard, and the pleadings being read, the defendant thereupon admits that the elm trees, described in the complaint, are no more obstruction to the free use of the streets and sidewalks for travel than any other trees located on the streets of the city, but reiterates its allegation, that the said elm trees, and all other elms of the city, are nuisances in that they obstruct the sewerage of the said city. The Court, thereupon, from the pleadings in the case and the admissions in open court, finds the following facts:

"1st. That the defendant is a municipal corporation, duly chartered and organized.

2nd. That the plaintiff is, and has been for many years, a resident of the said city, and owns and occupies a dwelling house situated on the eastern side of James street in said city, and fronting about 105 feet on said street; that in front of said residence, and on the western side thereof, extending along the whole front thereof, and just inside the curb line of the sidewalk of said city, there have been for the last twenty years, and now are, seven or eight large, handsome elm trees, planted by the plaintiff and those through whom she claims title to the said lot, which said trees add greatly to the appearance and enjoyment of her said premises, and said trees make no more obstruction to the free use of the said sidewalk and street by the public for passage over it than is made by all other trees in said city.

3rd. That the plaintiff has a property right in said trees.

4th. That about twelve years ago the defendant constructed in said city a general system of sewerage, a portion of which passed through the middle of the street in front of the premises of the plaintiff, and which is now in use; that roots from some of the elm trees in the said city have penetrated in some portions of said city into the said sewer, and have thereby rendered the same less useful.

5th. That the said city is the owner of a system of waterworks, supplying water to residents of said city for compensation, and furnishing water to the city for public use, which system of water-works is used in connection with the said system of sewerage by both said city and the citizens thereof, both constituting one system for the purpose of furnishing water, and, after its use, for the purpose of carrying off same.

6th. That on 7 January, 1907, the defendant took action to cause the trees of the plaintiff and all other citizens of the town to be cut down and removed from the streets of the city, as appears from the minutes of the meeting of the board of aldermen of said city, held on 7 January, 1907, which is as follows: 'The Street Committee was empowered to have all the elm trees along the line of the city sewers removed, and chief of police was instructed to employ a force of hands for that purpose, and to sell wood from said trees to help in defraying the expense of the removal of the same, having been condemned as injurious to sewers.'

That pursuant to said order the authorities of the said city have cut and removed from the streets of said city a number of elm trees, and were, at the beginning of this action, threatening to cut down and remove the trees of the plaintiff; that the plaintiff had no other notice of the purpose to cut down her trees than arises from the knowledge of the existence of the said order, and afterwards, an appearance by her agent before the board to effect a compromise, which was refused.

7th. That no proceedings were had or begun to condemn plaintiff's trees, and no compensation was tendered or offered to her for their destruction.

8th. That section 27 of the charter of the city of Goldsboro, provides that, among the powers herein conferred on the Board of Aldermen, they shall provide water, provide for repairing and draining the streets, * * * regulate, suppress, and remove nuisances * * * .

9th. That section 38 of the charter provides that the Board of Aldermen shall have power to lay open the new streets within the corporate limits of the city whenever by them deemed necessary, and have power at any time to widen, enlarge, change or extend or discontinue any street or streets, or any part thereof, within the corporate limits of the city, and shall have full power and authority to condemn, appropriate to use, any land or lands necessary for any of the provisions named in this section.

10th. That section 46 of the charter provides, that the Board of Aldermen shall cause to be kept clean and in good repair the streets, sidewalks and alleys; they may establish the width, ascertain the location of those already provided, and lay out and open up others, and may reduce or increase the width of all of them."

And it was thereupon considered and adjudged by the Court:

"That it is not within the power of the defendant to destroy the trees in which the plaintiff has a property right, without just compensation to be ascertained upon due notice, and it is further considered and adjudged, that the defendant be perpetually enjoined from proceeding to cut down said trees until and unless a proper proceeding is instituted to condemn the same.

It is further adjudged, that the plaintiff recover the costs of the defendant, to be taxed by the Clerk."

Defendant excepted and appealed.

Isaac F. Dortch and *Aycock & Daniels* for plaintiff.
J. L. Barham for defendant.

HOKE, J., after stating the case: The decisions of this State are against the plaintiff's position, and the ruling of the Court below, upholding it; notably, the case of *Tate v. Greensboro*, 114 N. C., 392. That was a case involving the right of a city to remove shade trees from the streets and sidewalks, and the Court held as follows:

"1. A city has exactly the same rights in, and is under the same responsibilities for, a street which it controls by dedication only as in and for one which has been granted or condemned; and the rights of the abutting proprietor are no greater in such street than if it had been granted or condemned.

2. The law gives to municipal corporations an almost absolute discretion in the maintenance of their streets, since wide discretion as to the manner of performance should be conferred where responsibility for improper performance is so heavily laid.

3. The charter of the city of Greensboro and the general law of the State (The Code, ch. 62, Vol. II) give to the municipal authorities of that city wide discretion in the control and improvement of its streets, and if damage result to an abutting property owner by reason of acts done by it neither negligently nor maliciously and wantonly, but in good faith in the careful exercise of that discretion, it is *damnum absque injuria.*

4. The Courts will not interfere with the exercise of a discretion reposed in the municipal authorities of a city as to when, and to what extent, its streets shall be improved, except in cases of fraud and oppression constituting manifest abuse of such discretion."

In order to show how far the principle was applied in that decision, it appeared that the city authorities, having concluded that the trees, from their shade and placing, tended to prevent the proper maintenance of the streets in reference to the public benefit and convenience, ordered their removal, and on the hearing the Judge found: "That the trees did not obstruct the passage of persons on the sidewalks; that the public convenience did not require their destruction; that the mud hole in the street, for the removing of which this act seems to have been done, could have been remedied without cutting down the trees. And, on the facts, *Burwell, J.,* in his well considered opinion, thus stated the question presented:

"This phase of the case presents for our consideration this question: Can the Courts review the exercise by the city of Greensboro of its power to repair and improve its streets and remove what it considers obstructions therein, and find and declare that certain trees in the streets of that city, which the municipal authorities honestly believe were injurious and obstructive to the public, were in fact not so, and upon such findings, there being no allegation of negligence or of any want of good faith on the part of the city, award damages to an abutting proprietor, the comfort of whose home has been lessened by the removal of the trees?"

And in reference thereto, among other things, said:

"Hence it is that the law gives to all such corporations an almost absolute discretion in the maintenance of their streets, considering, it seems, as is most reasonable, that wide discretion as to the manner of performance should be conferred where responsibility for improper performance is so heavily laid. Illustrative of this is the provision of the Code, 3803, that the commissioners of towns 'shall provide for keeping in proper repair the streets and bridges of the town *in the manner and to the extent they may deem best.*' We think that under its charter and under the general law of the State (The Code, ch. 62, Vol. II) the city of Greensboro was clothed with such discretion in the control and improvement of its streets, and if damage comes to the plaintiff by reason of acts done by it, neither negligently nor maliciously and wantonly, but in good faith in the careful exercise of that discretion, it is *damnum absque injuria. Smith v. Washington,* 20 How., 136; *Brush v. City of Carbondale,* 78 Ill., 74; *Pontiac v. Carter,* 32 Mich., 164."

The opinion further quotes with approval from the case of *Chase v. City,* 81 Wis., 313, as follows:

"The right of the public to the use of the street for the purpose of travel extends to the portion set apart and used for sidewalks, as well as to the way for carriages, wagons, etc., and, in short, to the entire width of the street upon which the land of the lot owner abuts. As against the lot owner the city, as trustee of the public use, has an undoubted right, whenever its authorities see fit, to open and fit for use and travel the street over which the public easement extends to the entire width, and whether it will so open and improve it, or whether it should be opened and improved, is a matter of discretion to be determined by the public authorities to whom the charge and control of the public interests in and over such easements are committed. With this discretion of the authorities Courts cannot, ordinarily, interfere upon the complaint of the lot owner so long as the easement continues to exist. * * * The public use is the dominant interest, and the public authorities are the exclusive judges when and to what extent the streets shall be improved. Courts can interfere only in cases of fraud and oppression, constituting manifest abuse of discretion. It necessarily follows, that for the performance of this discretionary duty by the city officers in a reasonable and prudent manner, no action can be maintained against the city."

This doctrine, so clearly and forcibly stated by the learned Justice, was apparently qualified to some extent in *State v. Higgs,* a decision of this Court, reported in 126 N. C., 1014, but this last decision was itself overruled in the recent case of *Small v. Edenton,* 146 N. C., 527, and it may now be considered as established with us, that our Courts will always be most reluctant to interfere with these municipal governments in the exercise of discretionary powers, conferred upon them for the public weal, and will never do so unless their action should be so clearly unreasonable as to amount to an oppressive and manifest abuse of their discretion. This position is, we think, supported by the better reason, and is in accord with the decided weight of authority. *Brodnax v. Groom,* 64 N. C., 244; *Chase v. City,* 81 Wis., *supra; City v. Shaw,* 155 Ill., 37; Smith's Mod. Law Munic. Corporation, section 1311.

True, the doctrine announced in *Tate v. Greensboro, supra,* was in reference to the removal of shade trees when considered as an obstruction to travel, but the dominant principle discussed and applied was in reference to the general power of a municipal government over its streets when exercised for the benefit and convenience of the public; and this principle is none the less potent, and its application none the less necessary, because the motive and purpose of exercising the power was for the preservation of the city sewerage. It is well established that the right of user for the last purpose arises to the public by reason of the dedication (Elliott on Streets, sec. 17), and, in a matter of such supreme and controlling importance, it would lead to most deplorable results if municipal governments could be stopped or hindered in their efforts, taken in good faith, to preserve the public health, unless their action should come clearly under condemnation within the principle announced as law in that decision.

Nor could any valid objection be made because no notice was given plaintiff. It is true, that where condemnation is required, notice must be provided for or given at some stage of the proceedings, though we have held, in *State v. Jones,* 139 N. C., 613, that such notice is not required when the order of appropriation is made, but is sufficient if provided for when the appraisement is made or the amount of compensation is to be fixed; but that is where some right of the injured party is wrongfully invaded, making condemnation proceedings necessary. In the present case, as we have endeavored to show, the authorities of the city being in the exercise of discretionary powers, conferred upon them by the law for the welfare of the public, and there being no evidence tending to show a want of good faith or oppressive abuse of their discretion, there is no legal right of plaintiff infringed upon. The injury, if any suffered by her, is *damnum absque injuria.*

We again refer to *Tate v. Greensboro, supra,* as authority for the position that no notice was required.

There is nothing here said which conflicts, or is intended to conflict, with the decision of this Court in *Brown v. Electric Co.,* 138 N. C., 533, cited, and to a great extent relied upon, by plaintiff. In that valuable opinion, delivered in protection of the just rights of the individual citizen, it was held, that a municipal government had no power to confer upon a corporation, exercising its privileges for purposes of private gain, the right to construct and operate a street railway, along the public streets of a city or town, so as to deprive abutting owners of their right to compensation by reason of the additional burden thus placed upon the streets. A perusal of the opinion will show that the decision was placed distinctly on the ground that such action of the city government was clearly not taken for the benefit of the public, or in the exercise of powers conferred for its benefit and which were contemplated and included in the original act of dedication, but in promotion of a private enterprise. Accordingly, it was held in that case:

"3. An abutting owner has property in shade trees standing along the sidewalk which the law will protect, and they may not be removed except where their removal is necessary for the use of the street as a public highway."

There was error in the judgment entered below, and, on the facts stated and admitted, there should be judgment entered that defendant go without day, and it is so ordered.

Reversed.

NANNIE J. MYATT v. W. A. MYATT.

(Filed 19 November, 1908).

1. **Deeds and Conveyances—Undue Influence—Evidence—Questions for Jury.**

   Upon evidence tending to show that the grantor of a deed was not a provident or industrious man, that he was addicted to drink and was, at times, but not usually, incapable of attending properly to his business, and that usually he managed his own affairs, made contracts, executed deeds, etc., and that he was sober and clothed in his right mind at the time he executed the deed in question, the verdict of the jury that the deed in question was not obtained through undue influence will not be disturbed on appeal.

2. **Deeds and Conveyances—Undue Influence—Evidence—Fraud.**

   While undue influence sufficient to set aside a deed does not necessarily include moral turpitude, or even an improper motive, yet, when the deed is the result of a dominant influence exercised over the mind of the grantor by another, so that the mind of the grantor is suppressed or supplanted and the deed expresses the will of the actor producing the result, the deed so obtained is not improperly termed fraudulent.

3. **Deeds and Conveyances—Undue Influence—Witnesses—Evidence Impeaching—Opinion of Mental Condition—Hearsay Evidence.**

   In an action to set aside a deed for undue influence, a party asked his own witness to give his opinion of the mental condition of the grantor's mind during the period of several weeks just prior to the execution of the deed. He had previously stated he did not know what this condition was. The Court, in its discretion, refused to allow the witness to answer. *Held*, no error for that (a) It would, to some extent, permit the party to cross-examine his own witness; (b) The answer to the subsequent question could only have been a conclusion or inference from hearsay, or the opinion of others, taking it without the rule that such opinion, to be competent, must come from the association or personal observation of the witness himself.

4. **Evidence, Newly Discovered—Cumulative Evidence.**

   A motion for a new trial upon newly discovered evidence must be overruled, when it appears that the evidence relied on is only cumulative.

ACTION tried before *Biggs, J.*, and a jury, April Term, 1908, of WAKE.

On the trial it was shown, among other things, that on 10 November, 1906, Alfred R. Myatt, husband of *feme* plaintiff, executed and delivered to his brother, W. A. Myatt, a deed for a certain tract of land, lying in Wake County, for the sum of one thousand dollars, which had been paid; and said deed was duly acknowledged and filed for registration on the day of its execution. That prior to that time, to-wit, on 21 August, 1906, said Alfred R. Myatt had executed a deed for the same tract of land to his wife, the *feme* plaintiff, acknowledged the day of its execution before Charles Adams, Esq., a Justice of the Peace of Wake County, and registered 20 February, 1907.

Plaintiff complained and alleged that the deed to defendant had been procured by fraud and undue influence on the part of defendant, and issues were submitted and responded to by the jury as follows:

"1. Was the deed of 10 November, 1906, from Alfred R. Myatt to the defendant W. A. Myatt, obtained through undue influence by the defendant, W. A. Myatt? Answer: 'No.'

"2. Was the deed of 10 November, 1906, from Alfred R. Myatt to the defendant W. A. Myatt, obtained through fraud by the defendant, W. A. Myatt? Answer: 'No.'"

There was judgment on the verdict for the defendant, and plaintiff excepted and appealed. Motion was further made in the court for a new trial on account of newly discovered evidence.

B. C. Beckwith for plaintiff.

Walter Clark, Jr., and *Holding & Bunn* for defendant.

HOKE, J., after stating the case: We have given this cause and the exceptions made by appellant, all of them, full and careful consideration, and are of opinion that there has been no error committed in the trial, certainly none that could give the plaintiff any just ground of complaint; nor do we find in the record, or case on appeal, testimony that would justify a verdict either of incapacity in grantor, or of fraud or undue influence on the part of the grantee as to the deed in question. True, there is evidence tending to show that the grantor, Alfred R. Myatt, was not a provident or a very industrious man; that he had the drinking habit, and was at times incapable of attending properly to his business, but this last was not at all his usual condition. On the contrary, he could, and did, as a rule, manage his own affairs, made contracts, executed deeds, including that to *feme* plaintiff herself, and under which she claims, and transacted business generally, on the part of himself and his wife, right up to the transaction involved in the litigation. Further, the great weight of the testimony is to the effect, that said Alfred R. Myatt was sober and clothed in his right mind at the time he executed the deed in question; and there is very little, if any, evidence that defendant had especial influence over him, and none at all that he exercised, or endeavored to exercise, it on this occasion.

An exception especially urged for error, was to the refusal of the Court to allow the plaintiff to ask a question of one of her own witnesses, W. B. Temple, not an expert, in reference to the mental condition of Alfred R. Myatt during the period of three or four weeks just prior to the execution of the deed, as follows:

"In your opinion was Alfred R. Myatt, at that time, a fully responsible man, a sane man?

Defendant objected; sustained, and plaintiff excepted."

Another question of this witness as to same period was also disallowed.

"Q. Was his mind unbalanced?

The Court stating that he declined to allow the question in the exercise of his discretion."

There is no allegation in the complaint, as a distinct and independent ground of relief, that Alfred R. Myatt did not have mental capacity to make this deed, but if it be conceded that his mental condition during the period in question was relevant in so far as it tended to show that he was more susceptible to undue influence at the time, this witness had just made answer to a question addressed to the same period, as follows:

"Q. What was the condition of his mind? Answer: 'I cannot say as to his mind.'"

And the Court might very well conclude that the witness having just made answer that he could not say as to his mind, the subsequent questions were to some extent an effort on the part of plaintiff to cross-examine her own witness, and in that way subject to be rightfully disallowed in the exercise of his Honor's discretion; or the question could have been held incompetent on the ground that, the witness having just stated that he could not say as to the condition of the grantor's mind during the period referred to, an answer to the subsequent questions could only have been a conclusion or inference of the witness adopted from hearsay or the opinion of others; and while it is held with us that opinion evidence, in strictness non-expert, may be received as to the condition of a person's mind, when relevant to the inquiry, such opinion must come from the association or personal observation of such a witness, and not proceed from facts and circumstances detailed to him by others. *McRae v. Malloy,* 93 N. C., 154; *Clary v. Clary,* 24 N. C., 78.

Plaintiff further insists there was error in the portion of his Honor's charge in regard to the question of undue influence, which was, in part, as follows:

"Undue influence is a fraudulent influence overruling or controlling the mind of the person operated upon, the fraudulent influence by which the will of the maker, that is, in this case, the will of Alfred R. Myatt, is perverted from its free exercise, and there is sustained injury, and the will of the influencing party substituted for it.

"Did the defendant, W. A. Myatt, possess over Alfred R. Myatt, his brother, an undue influence as defined by the

Court? And, if so, did he make a fraudulent use of it and thereby procure the deed of 10 November, 1906? Did the defendant possess and exert a fraudulent influence over Alfred R. Myatt *sufficient to destroy or pervert free agency in him,* so that the act of executing the deed was the result of the domination of the mind of the defendant, rather than the expression of the will and mind of Alfred R. Myatt?"

The objection being, that too much stress is given to the element of fraud as a part of the definition. But the charge is in substantial accord with our decisions on this subject. *In re Abee's Will,* 146 N. C., 273; *Wright v. Howe,* 52 N. C., 412; *Marshall v. Flynn,* 49 N. C., 199.

It is true, that to constitute undue influence it is not necessarily required that there should exist moral turpitude or even an improper motive; but if a person, from the best of motives, having obtained a dominant influence over the mind of a grantor, thereby induces him to execute a deed or other instrument materially affecting his rights, which he would not have made otherwise, exercising the influence obtained to such an extent that the mind and will of the grantor is effaced or supplanted in the transaction so that the instrument, while professing to be the act and deed of the grantor, in fact and truth only expresses the mind and will of the third person, the actor who procured the result, such an instrument so obtained is not improperly termed fraudulent. Accordingly, it is held in *Marshall v. Flynn, supra,* "that the influence which destroys the validity of a will is a fraudulent influence, controlling the mind of the testator so as to induce him to make a will which he would not otherwise have made."

And all of our decisions, as stated, are to like effect, and uphold the definition given by the Court in the present case.

The motion for new trial, for newly discovered testimony, must be also overruled. The evidence suggested in the affidavits is at best only cumulative, and, under our decisions, is entirely insufficient to justify favorable consideration on the part of the Court. *Gay v. Mitchell,* 146 N. C., 509, and authorities there cited.

There is no error in the record to plaintiff's prejudice, and the judgment below is affirmed.

No error.

SOPHIA BEESON v. DANIEL SMITH.

(Filed 19 November, 1908).

1. **Deeds and Conveyances—Undue Influence of Third Persons—Relief Granted.**

   If a deed is procured by the fraud or undue influence of one acting as agent of the grantee therein; or if the grantee in such deed was a volunteer or bought with notice of the wrong done, or of facts sufficient to put a man of average business prudence on inquiry that would lead to knowledge, the grantor is entitled to adequate and proper relief.

2. **Same—Instructions.**

   In an action to set aside a deed to lands alleged to have been procured by fraud or undue influence, there was evidence tending to show, that the defendant (grantee) and plaintiff (grantor) were brother and sister, and the latter executed to the former a deed reciting a valuable consideration of $10, with stipulations that he was to take care of her, look after her affairs during life and provide a suitable burial for her body at her death; that in return for this service he was to have and own all of her personal property owned at the time of her death; that she was not of sufficient mental capacity to make the deed, and that it was procured by fraud and undue influence of a nephew by marriage, who had for some time previous lived on her land. *Held,* it was error in the trial Judge to charge the jury, in effect, that for the sister, the plaintiff, to recover, she must establish, by proper proof, that the execution of the instrument in question had been procured by the fraud or undue influence of the defendant, or that the defendant was a party to it.

ACTION, heard before *Webb, J.,* and a jury, July Term, 1908, of RANDOLPH, to set aside a deed and a written contract on the ground of mental incapacity, and fraud, and undue influence.

The deed from plaintiff to defendant, who was brother to plaintiff, conveyed to defendant the plaintiff's land, recited a valuable consideration of $10, and contained a stipulation, in effect, that, during the life of the grantor, the land conveyed was to be occupied by the grantee and his heirs as tenants, paying to the grantor one-third of the crop as rent, etc.; and the contract was to the effect, that the defendant Daniel Smith was to look after the personal interests of Sophia Beeson, and see that she was taken care of during her life and provide her a suitable burial on her death, and, that for this service, the defendant was to have and own all the "personal property and belongings" of said plaintiff which she should leave at her death, etc.

There was evidence on the part of plaintiff tending to show mental incapacity in the grantor at the time of the execution of these instruments, and that the same were procured by fraud and undue influence on the part of defendant and of one Dave Ferree, who had married a niece of plaintiff and defendant, and had for some time previous lived on plaintiff's land. Issues were submitted and responded to by the jury, as follows:

"1. Did the plaintiff have sufficient mental capacity to make and execute the deed and contract set out in the complaint on 25 January, 1905? Answer: 'Yes.'

"2. Was the deed and contract described in the complaint obtained by fraud and undue influence? Answer: 'No.'

"3. Was the plaintiff induced to execute said deed and contract by false and fraudulent representations of the defendant, or by any one for him? Answer: 'No.'"

Among other things, and on the second and third issues, the Court charged the jury as follows:

"If the jury should find to their satisfaction, from the evidence, that David Ferree, or any other person, exerted an undue influence over the plaintiff or perpetrated a fraud upon her, or made false representation to her in order to get her to sign the deed and contract in controversy, this would not be sufficient ground for answering the second and third issues, 'Yes,' unless the plaintiff has proven to your satisfaction that the same was procured to be done by the defendant, or that he was a party to it."

The plaintiff excepted. There was judgment on the verdict for defendant, and the plaintiff excepted and appealed.

Morehead & Sapp for plaintiff.
Hammer & Spence for defendant.

HOKE, J., after stating the case: The authorities of this State are to the effect, that the deeds and contracts of insane persons, certainly when there is no formal adjudication of their insanity in force at the time, are voidable, and not necessarily void; and the same is true of deeds procured by undue influence or fraud in the treaty or bargain. In actions brought for the purpose, Courts, on established principles of equity, may set them aside altogether, or only *sub modo*, and administer the relief that right and justice may require.

In the case of insane persons, and the relief to be afforded under certain conditions, an instructive case will be found in *Sprinkle v. Wellborn*, 140 N. C., 163, and other decisions in this State are in accord with that well considered opinion. *Chamblee v. Broughton,* 120 N. C., 170; *Odom v. Riddick,* 104 N. C., 515; *Riggan v. Green,* 80 N. C., 237; *Carr v. Holliday,* 21 N. C., 344.

In the case of deeds procured by fraud in the treaty, or undue influence, which is held to partake of the nature of fraud (*Myatt v. Myatt*, at the present term) Courts are more disposed to set the instruments aside, but, even in these cases, such a decree is not always or necessarily required, but such relief will be given as the merits of the case may require. And this appropriate relief will be afforded, not only against the principal, where he is grantee in the deed, but also against persons who were or have become beneficiaries of the fraud, when they are volunteers or purchasers with notice, or when the deeds have been procured by the fraud or undue influence of one who is acting in the transaction as agent of grantee. *Squires v. Riggs,* 4 N. C., 253; *Derr v. Dellinger,* 75 N. C., 300; *Hariss v. Delamar,* 38 N. C., 319; *Huguenin v. Basely,* 14 Ves., 273; *Corbett v. Clute,* 137 N. C., 546; *Black v. Baylees,* 86 N. C., 527.

In *Huguenin's Case, supra,* in entering a decree setting aside a deed under which third parties, to-wit, the wife and children of the defendant, as volunteers, had acquired an interest, the Chancellor said:

"With regard to the interests of the wife and children of the defendant, there was no personal interference upon their part in the transactions, that have produced this suit. If, therefore, their estates are to be taken from them, that relief must be given with reference to the conduct of other persons; and I should regret that any doubt could be entertained, whether it is not competent to a court of equity to take away from third persons the benefits which they have derived from the fraud, imposition, or undue influence of others." And in the same opinion, he quotes with approval the words of *Chief Justice Wilmot,* in a similar case, as follows: "There is no pretense, that Green's brother or his wife was party to any imposition, or had any due or undue influence over the plaintiff; but does it follow from thence that they must keep the money? No; whoever receives it must take it tainted and infected with the undue influence and imposition of the person procuring the gift; his partitioning and cantoning it out amongst his relations and friends will not purify the gift, and protect it against the equity of the person imposed upon. Let the hand receiving it be ever so chaste, yet if it comes through a polluted channel, the obligation of restitution will follow it."

And like decision was made in our own Court, *Hariss v. Delamar, supra,* in which it was held: "That an instrument obtained by fraud and imposition on the part of a father, in behalf of his infant children, must be set aside in equity."

And in *Corbett v. Clute,* 137 N. C., at p. 551, being a case where an instrument had been procured by the misconduct of an agent, the Court said: "It will not be contended that the plaintiff is not bound by the statements of his agent. He is here now, asserting his claims under the note and mortgage obtained for him by this transaction, and if he claims the benefits he must accept the responsibility." Citing *Hariss v. Delamar,* and *Black v. Baylees, supra.*

The correct application of these principles will show that there was error in the portion of his Honor's charge excepted to by plaintiff, and that he should not have restricted the defendant's liability by directing the jury, in effect, "that they could not render a verdict for plaintiff on the second and third issues, unless it was established by proper proof that the execution of the instruments in question had been procured by the fraud or undue influence of the defendant, or that said defendant was a party to it." For, as indicated in these decisions, if these instruments were procured by the fraud or undue influence of one acting as agent of the defendant, the grantee in the deed; or if the defendant was a volunteer or bought with notice of the wrong done the plaintiff, if such wrong was done, or of facts sufficient to put a man of average business prudence on inquiry that would lead to knowledge, in either event, the plaintiff would be entitled to adequate and proper relief.

We are of opinion that there was error committed to plaintiff's prejudice, and that there should be a new trial on all the issues. It is so ordered.

New trial.

C. F. MEACHAM v. THE SOUTHERN RAILWAY CO.

(Filed 19 November, 1908).

1. **Railroads—Duty of Employer—Negligence—Evidence Sufficient.**

In an action for damages for personal injury, evidence of negligence is sufficient to take the case to the jury which tends to show, that, on a dark night, without the customary signal or warning, except the rumbling noise caused by its approach, an engine, which had been coupled to the train, but had gone for water, returning and making a coupling to the train, struck the train on a level track, with violence, the force being sufficient to drive the entire train of twenty-two cars back to the distance of from a car and a half to two-car lengths, just as the plaintiff, in the discharge of his duties as employee, was getting into the cab of his engine coupled at the other end of the train, thereby throwing him in front of his engine onto the track ahead, and causing the injury complained of.

2. **Railroads—Rule of Employer—Protection of Trains—Interpretation of Rules—Sidings.**

A rule of the employer, a railroad company, to the effect that a flagman is directed to go back a given distance to the rear of his train and place torpedoes in certain places, "when a train is stopped at an unusual point, or is delayed at a regular stop-over three minutes, or when it fails to make its schedule time," is for the protection of trains when they are on the main line at an unusual place, or for an unusual length of time, and for the purpose of preventing injury by reason of other trains coming from the rear, and has no application to trains on a siding at a regular station, in no apparent danger.

3. **Same—Evidence—Nonsuit—Contributory Negligence.**

Evidence tending to show that defendant railroad company negligently caused plaintiff to be thrown to the ground, and inflicted the injury complained of, while his train was on a siding at a regular station without apparent danger from approaching trains, and that he was acting under the instruction of his superiors in charge, or with their knowledge and approval, is not affected by the fact that he was not acting under a rule made for the protection of trains when on the main line, so as to raise the question of contributory negligence; and a judgment of nonsuit upon the evidence based on this contention is properly refused.

4. Rules of Employer—Interpretation—Parol Evidence—Rule Inapplicable.

Parol evidence tending to show that conditions had arisen in a particular instance so that a printed rule of employer did not apply, is not an interpretation of the rule by parol.

ACTION tried before *Cook, J.*, and a jury, at January Term, 1908, of McDOWELL.

The action was to recover damages for personal injuries caused by the alleged negligence of the defendant company, and on issues submitted, the jury rendered the following verdict:

"1. Was the plaintiff, C. F. Meacham, injured by reason of the negligence of the defendants, as alleged in the complaint? Answer: 'Yes.'

"2. Did the plaintiff, C. F. Meacham, by his own negligence, contribute to his own injury? Answer: 'No.'

"3. What damages, if any, is the plaintiff entitled to recover? Answer: '$5,800.'"

There was judgment on the verdict for plaintiff, and defendant excepted and appealed.

Pless & Winborne for plaintiff.
S. J. Ervin for defendant.

HOKE, J. We are of opinion that no error was committed on the trial of this cause below, and that the judgment in favor of the plaintiff should be affirmed. The evidence tended to show, and the jury have found, that plaintiff, a flagman on a freight train of defendant company, has had his arm crushed so that it had to be amputated, and by reason of the culpable negligence of his co-employees in making a coupling of the engines to the train on which plaintiff was engaged, at the time of the injury, and that plaintiff himself is free from blame in the matter.

There was testimony to the effect that the train in question was a freight train of twenty-two cars, going from Spencer to Asheville, and, at the time of the occurrence, had taken a siding at Greenlee, N. C., to let No. 12, a passenger train, pass, and had been upon the siding for some time before that train went by. After No. 12 had passed, it was found that the engine attached to the train was without sufficient water and would have to proceed to Old Fort, a point on the road about five miles further west, to get water. The engine was detached from the train, pulling out on the main track some distance ahead, and then backed down the main track to the caboose in rear of the freight, where the conductor, Luther Roper, and plaintiff then were. The engineer had also been in the cab, as will be seen from this extract from the testimony.

"Q. Which way was your train going? A. 'Going west.'

"Q. And standing on the side-track at Greenlee? A. 'Yes, sir.'

"Q. No. 12 is a passenger train? A. 'Yes, sir; passenger train that goes east. We were there some little time, and while we were there I was busy making out daily reports and time tickets, etc., and doing conductor's work, which it was my duty to help him do, and after No. 12 passed the engineer left the cab. He was in the cab before No. 12 passed, and after No. 12 passed he went back to the engine, and in a few minutes he pulled down the main line, and said he was out of water, and would have to go to Old Fort to get water; and the conductor said: 'I believe I will go with him.'

"Q. Who was the conductor? A. 'Luther Roper. He said: 'Meacham, hold everything until we get back.' He got on the engine and went off.' "

After the engineer had gone up the track towards Old Fort, the plaintiff went out to the rear of the caboose to be in a position to carry out the order of the conductor, and plaintiff testified: "After staying there awhile I sat down on the main line rail for some time—on the north side of the main line track. I just thought of a chair that was in the cab that we used for writing or a bunk or desk, or any way, there was a chair in the cab; and I went back in the cab and got the chair, and I sat in it between the side-track and the main line, and I set there for some time. I don't know how long, maybe forty, forty-five or fifty minutes, or maybe, not that long. It was pretty dark that night, and cloudy, and I heard a rumbling like a train coming." While plaintiff was in this position he heard a rumbling which he ascertained to be his engine returning, and witness then picked up his chair preparatory to getting into the cab, where it was his duty to be as soon as the coupling was made, so that the train could move off without delay. As the witness was in the act of mounting the steps with the chair in one hand, and had taken hold of the handle-bar with the other, without any signal or warning of any kind, the engine struck the train with great violence, the force being sufficient to drive the entire train of twenty-two cars back from a car and a half to two car lengths. By the force of the impact, the plaintiff was knocked loose from the car and on to the track in front of the train as it was then moving, and in the effort to save his life, his arm was run over and crushed as stated.

The negligence imputed to the defendant, on this testimony, and established by the verdict, was:

"1. In backing up to the train to make the coupling without giving a proper signal.

"2. By striking the train with unusual and unnecessary violence."

The evidence as to the first proposition is thus stated in the record, p. 20:

"Q. What signal did the engineer give before striking the train? A. 'None at all.'

"Q. What is the usual signal that he should have given?

"(Defendant objects).

"Q. What signal, according to the custom of the management of trains? What was the usual signal to be given before striking a train to make a coupling?

"(Defendant objects).

"A. 'In backing in a train or just one car, it was the usual custom and it is the rule—

"(Defendant objects).

"Q. Just state the usual custom.

"(Defendant objects).

"A. 'It is usual to blow three short blows.'

"(Defendant objects).

"Mr. Erwin: This rule that you speak of, was this a printed or written rule? A. 'It is a printed rule.'

"Court: Do you know what the custom was? A. 'Yes, sir; certainly I do.'

"(Defendant objects).

"Mr. Erwin: The custom, you say, is embodied in a written rule? A. 'Yes, sir; engineer's rules.'

"Q. In a printed book of rules? A. 'Engineer's rules.'

"Q. It is in that book? A. 'I think I have seen it in this book.' "

And the statement already made is to the effect of the collision, when the coupling was made, in knocking the plaintiff's hold loose, and driving a train of twenty-two cars that unusual distance. There was the additional evidence on this point, to the effect that the track here was practically level, and that the movement of two or three cars at the front of the train was all that was required or should have taken place in making an ordinary or proper coupling.

It was not seriously contended on the argument, that the employees of defendant company were not negligent by reason of the manner in which the coupling was made, but it was earnestly urged that a nonsuit should have been directed, on the ground that the plaintiff was not where he had any right to be at the time, and was not there in proper discharge of his duty, and this chiefly by reason of a rule (No. 99) to the effect, that a flagman is directed to go back a given distance to the rear of his train and place torpedoes in certain places, "when a train is stopped at an unusual point, or is delayed at a regular stop-over three minutes, or when it fails to make its schedule time."

It is claimed that if plaintiff had been acting in obedience to this rule at the time, he would not have been in any position of danger of any kind with reference to the coupling; and for this reason, while the engineer may have been culpably negligent in making the coupling, as a general proposition, he was under no duty or obligation of any kind to the plaintiff. But the Court is clearly of the opinion that the rule in question has no bearing on the rights of these parties, and was never intended to apply to the facts presented in this case; and for this position, both the language and purpose of the rule itself, and the objective facts and the testimony and conduct of all the parties in reference to it, afford convincing reason. The rule was made for the protection of trains, and when they were on the main line at an unusual place, or for an unusual length of time, and for the purpose of preventing injury by reason of other trains coming from the rear. It was never intended to apply when a train was on a siding and at a regular station. As said by plaintiff in his evidence, "My train was not in danger from anything but robbery, it was safe by reason of its being on the siding." They had already been on that siding when No. 12 passed going east, for more than an hour, waiting, and yet the engineer, the conductor and the flagman were all in the cab at that time, and no one had pretended to go back in obedience to this rule. But, it was urged, that while this might be true as to the train, it was not true as to the engine when it passed out of the siding and on to the main line going towards Old Fort. But the rule is made for the government of trains and the crews attached thereto. It begins by saying, "when a train is stopped," and in several places it says, "the flagman shall go back a given distance to the rear of *his* train." If the plaintiff is to be made a part of the engine crew and charged with duties concerning it, because the engine had itself become a train, he should be allowed the distance he was behind the engine. There was certainly twenty-two cars ahead, and how much farther it was to the head of the switch when the engine entered on the main line, does not definitely appear, and it should not be presumed against him that it was within the prohibited distance. At Old Fort the plaintiff was five miles behind the engine, and assuredly, he was not required to follow along behind the engine, keeping at the specified distance. The truth is that this was an emergency to be dealt with by special orders of the plaintiff's superior, the conductor, and the proof shows that these orders were given and obeyed by plaintiff. The conduct of the parties show that they all so understood it, and it may be noted that this is not an interpretation of a rule by parol testimony. They are facts showing that conditions had arisen to which the rule did not apply.

When the engineer backed his engine down the main line to the cab, preparatory to going to Old Fort, and the conductor got aboard to go with him, he did not tell the flagman to go back and place torpedoes. The order was: "Meacham, hold everything till we get back." The track was straight for a half or three-quarters of a mile each way, and it was a safe order for the conductor to give. And when the engine returned, and just before it coupled, the evidence as to the plaintiff's duty is thus stated:

"Q. What did you do then? A. 'I began to prepare to get in the cab.'

"Q. How soon? A. 'Immediately.'

"Q. What was your duty when you saw that engine approaching? A. 'To prepare to be in the cab and to be ready to move when they got ready.'

"Q. That was your duty? A. 'Yes, sir.'

"Q. How soon was it your duty to get ready? A. 'As soon as I could.'

"Q. When the first jolt was given to this train, did it knock you loose? A. 'Yes, sir; that was what knocked me loose.' "

And he was carrying out this duty when he received his hurt. To show that the statement of plaintiff was true, when the coupling was made the train moved right off without any wait for a flagman, and without any signal given to "blow him in," which was always required when a flagman was properly in the rear guarding his train. The engineer, testifying for defendant, undertakes to explain this, by saying that the reason he did not blow, he saw, from the flagman's light, that he was at the rear of the train, and didn't need any signal. If this is true, then a duty arose to plaintiff even if he had been before that acting in violation of a rule. Defendant's engineer had no right to maim or kill him when he saw he was in a position where he would mount the cab as he did. A coupling made in the usual and proper manner would have caused no such result, and plaintiff was guilty of no negligence in getting into the cab as he did, certainly none was proved.

The correct explanation of the wrong done will, no doubt, be found in the fact, which appears in evidence, that when the engine of the train was at Old Fort, the engineer asked for and obtained the assistance of the "helper," a powerful engine which assists in pulling the trains over the steep mountain grades from Old Fort to Swannanoa Tunnell. These two engines were coupled together when they were backed against the train, and this is the reason, no doubt, of the tremendous force of that impact by which a train of twenty-two freight cars was driven back on a level track one and a half or two car lengths. We are of opinion that actionable negligence on the part of defendant company has been established in a trial free from error, and the rule urged for defendant's exoneration is not properly available for the purpose.

Here is testimony where rule 99 did apply: "When the train moved off, after the coupling was made, and was about to enter on the main track, plaintiff sent a brakeman forward to notify the engineer that a flagman's arm was off, and he then turned to the dead-head conductor in the cab and said: 'Take your suspenders and cord my arm to stop its bleeding so, and take my light and light a fusee and go back and stop No. 75 from running into us.'" With his body maimed and his life wrecked, he thought of his train and was faithful to his duty.

There is no evidence tending to establish contributory negligence on the part of plaintiff, and the judgment below is affirmed.

No error.

RICHARD THOMPSON, Administrator, v. ABERDEEN & ASHEBORO R. R. CO.

(Filed 19 November, 1908).

1. **Evidence—Nonsuit—Questions for Jury.**
   In an action for damages alleged to have arisen from a wrongful death, if there is any evidence tending to show that the death was the result of defendant's negligence, it should be submitted to the jury, and a motion as of nonsuit upon the evidence disallowed.

2. **Railroads — Negligence — Death by Wrongful Act — Evidence — Questions for Jury.**
   In an action for damages claimed for a wrongful death owing to defendant's negligence, evidence should be submitted to the jury which tends to show, that on a dark night, about half an hour after plaintiff's intestate was seen at defendant's station, defendant's train came by at high speed, without headlights, and gave no warning or signals, at the proper places, which would indicate to plaintiff's intestate its approach; that, when last seen, plaintiff was drinking, and eating peanuts, and was found at

daylight the next morning in a dying condition, with injuries indicating that he had been struck by defendant's train, and with indications on his clothes, and on the ground near him, that, at or shortly before the time he was injured, he was eating peanuts.

3. **Same—Dangerous Surroundings.**

In a suit for damages alleged to have arisen from the negligent killing of plaintiff's intestate by the defendant railroad company's train, running fast without a headlight, and without having given signals of approach, in its yards at a station, on a dark night, it was error in the trial Judge to exclude evidence offered for the purpose of showing that the place of its occurrence was in the corporate limits of a town, and used as a walkway with defendant's knowledge.

ACTION tried before *Webb, J.*, and a jury, July Term, 1908, of RANDOLPH. Plaintiff appealed.

Morehead & Sapp and *C. D. B. Reynolds* for plaintiff.

W. J. Adams, J. T. Brittain, J. A. Spence and *Adams, Jerome & Armfield* for defendant.

CLARK, C. J. Appeal from a nonsuit in an action for wrongful death. The evidence must be taken in the most favorable light for the appellant and with the most favorable inferences the jury would be authorized to draw from it. *Powell v. R. R.*, 125 N. C., 372, and cases there cited. If there was any evidence tending to show that the death of the intestate was the result of the negligence of the defendant, it should have been submitted to the jury.

There was evidence that the plaintiff's intestate was seen at the defendant's station at Star about 9 o'clock at night, drinking, and eating peanuts; that a half hour thereafter, a mixed train of the defendant came from the North, running at a high speed—thirty or forty miles an hour—with no headlight; that it was a dark night; that the engine gave no signals, before or after crossing a country road near the corporate limits, nor at a crossing a few hundred yards further north; that about daylight the next morning the deceased was found in a dying condition, forty yards south of the crossing, in the corporate limits, with his head crushed, between the ends of the cross-ties, his hat torn, cut and greasy near him; that his clothes were bloody on one side, and blood was on the ground between ends of ties, and evidence on his clothes and on the ground near him, that he was eating peanuts at the time he was killed or shortly before; that his skull was driven in, and there were cuts and bruises on other parts of his body.

The defendant was negligent in operating a train at night without a headlight. *Willis v. R. R.*, 122 N. C., 909. The evidence was sufficient to authorize a finding that the deceased was killed by the defendant's train. The uncontradicted testimony was that the defendant was operating its train, at a high speed, on a dark night without a headlight, within the boundaries of an incorporated town, without giving any signals of its approach. The evidence is almost identical with that in *Powell v. R. R.*, 125 N. C., 372, which was held sufficient to support a verdict for the plaintiff. Besides, the authorities cited in that case, *Powell v. R. R.*, has itself been cited and approved since then in several cases, among them *Hord v. R. R.*, 129 N. C., 307; *Clegg v. R. R.*, 132 N. C., 294; *Butts v. R. R.*, 133 N. C., 83. There was sufficient evidence to entitle the plaintiff to his constitutional right to have it passed on by the jury.

As the case goes back, the defendant can, if it chooses, have the circumstances explained by its engineer. If neither the engineer nor fireman saw the man when he was struck, there was negligence (*Arrowood v. R. R.*, 126 N. C., 629) in not keeping a proper lookout, unless they were prevented from seeing by the negligence of the defendant in not furnishing a headlight, should the jury find that there was no headlight which, as the evidence now stands, is uncontradicted.

We think it was also error to exclude the evidence offered to prove that the defendant's track within the town limits was habitually used as a walkway, which, counsel stated, would, if admitted, have been followed by proof that this fact was well known to the defendant.

The judgment of nonsuit is set aside.

Reversed.

NOAH RUSHING, by next friend, v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 19 November, 1908).

Defendant's Appeal.

1. **Measure of Damages—Evidence—Earning Capacity.**
In an action to recover damages for personal injury caused by defendant's negligence, testimony tending to show the decreased earning capacity of plaintiff since the injury, is competent, and he may be asked what wages he received before and since the time thereof.

2. **Contributory Negligence—Evidence—Safe Appliances.**
When there is evidence tending to show that plaintiff was injured while in defendant's employment, by a log falling on him which he was carrying at the time, caused by defendant's negligent orders and negligent failure to furnish proper tools for the purpose, it is competent, to negative contributory negligence, to ask the plaintiff if he caused the log to fall on himself.

3. **Negligence—Evidence Conflicting—Question for Jury—Nonsuit.**
A motion as of nonsuit upon the evidence should be denied, in an action to recover damages alleged to have arisen from defendant's negligence, when the testimony tends to show that the injury was caused by an improper order of a vice principal, given to plaintiff in the course of his employment, and that the plaintiff was not negligent in doing the work.

4. **Contributory Negligence—Evidence—Safe Appliances—Assumption of Risks.**
The employer, a railroad company, owes a duty to the employee to furnish safe and suitable tools and appliances for work to be done by him, and the employee does not assume the risk of doing the work without them unless the act was obviously so dangerous that, in its careful performance, the inherent probabilities of injury were greater than those of safety.

5. Same—Proximate Cause.

When the injury complained of was the failure of the railroad to furnish certain implements, called "lug hooks," for moving heavy timber, which plaintiff was employed to help move, it is proper for the trial Judge to instruct the jury that, if they should find, by the greater weight of the evidence, that for such service "lug hooks" were usually used by railroads for the work, it was the duty of the railroad to have furnished them; that if they further found, by the greater weight of the evidence, that the character of the work was such that a man of ordinary prudence would be led to see that their use were safer, the failure to provide them would be negligence, which, if the proximate cause, would render defendant liable.

6. Negligence—Master and Servant—Fellow Servants.

A negligent and careless act of a fellow servant in throwing down the end of a log which the plaintiff, in the scope of his employment, was helping to carry, will render the employer (a railroad company) liable in damages, if the proximate cause of an injury to the plaintiff.

7. Pleadings—Connected Meaning—Evidence—Admissions.

When a part of a paragraph of a pleading offered in evidence is so connected with the other part not offered that the whole is necessary to give a connected meaning, it is incompetent.

ACTION tried before *Jones, J.,* and a jury, June Term, 1908, of ANSON. Both sides appealed.

Robinson & Caudle for plaintiff.
J. D. Shaw, Day & Allen for defendant.

DEFENDANT'S APPEAL.

CLARK, C. J. Action of damages for injuries caused by defendant's negligence. Under orders of the foreman the plaintiff and three others took in their hands a stick of timber, which was lying partly submerged in the water, and walked sideways with it, and while trying to climb up a five foot embankment the plaintiff stumbled and fell. The stick of timber fell on him, injuring him. Plaintiff testified that the defendant had for years used lug hooks in such work, which grasp a stick of timber; that if the lug hooks had been used on this occasion he would have walked forward, instead of sideways, at some distance from the stick of timber, and could hardly have stumbled and fallen; and if he had, the lug hooks would have held the timber so that it would not have fallen on him at all; that he asked the foreman if they should use the lug hooks with that log, but the foreman told them not to do so, but to carry the log in their hands.

The defendant's exceptions cannot be sustained. It was competent for the purpose of showing his decreased earning capacity to ask the plaintiff what wages he received before the injury, and what he was receiving, in his condition, at the time of trial. *Wallace v. R. R.,* 104 N. C., 442. It was also competent, to negative contributory negligence, to ask him if he caused the stick of timber to fall on himself.

The motion to nonsuit was properly denied. The case was properly one for the jury.

The defendant having offered in evidence part of paragraph five of the complaint, it was proper to refuse to admit it, unless the whole paragraph was offered. The paragraph was not separable into two, as in *Hedrick v. R. R.,* 136 N. C., 513, but was so connected that the part not offered in evidence was necessary to explain that which was offered.

The Court charged the jury, "It was the duty of the defendant railroad company to furnish the plaintiff with safe and suitable tools and appliances with which to do the work required of him by the defendant. The plaintiff will not be held to have assumed the risk in undertaking to perform a dangerous work, unless the act itself was obviously so dangerous, that in the careful performance the inherent probabilities of injury were greater than those of safety." The defendant could not complain of this. *Orr v. Telegraph Co.,* 132 N. C., 694.

The Court committed no error in charging the jury, as follows (which was duly excepted to): "That if the jury should find, by the greater weight of the evidence, that lug hooks were, at the time of the injury, used by railroads doing like work, such as moving heavy timbers, then it was the duty of the defendant to furnish the foreman with lug hooks; and should you further find, by the greater weight of the evidence, that the timber which the plaintiff was handling was such timber, because of weight, length, ground and surroundings, as would lead a man of ordinary prudence to see it was safer to use lug hooks than to use his hands, then failure of defendant to provide, and have them for use, would be negligence, and should the jury find that this negligent act was the proximate cause of the injury, they should answer the first issue 'Yes.'"

And the Court also correctly charged, though excepted to: "If the jury should find, by the greater weight of the evidence, that while the plaintiff was carrying the log he stumbled and fell, and, while down, his fellow servants, when they could have prevented the injury by holding the log, negligently and carelessly threw down their end of the log, when, by the exercise of ordinary prudence, they could have held it and prevented the injury, then it would be chargeable to the negligence of defendant's employees, and if this negligence of fellow servants was the proximate cause of the injury, the jury would answer the first issue 'Yes.'"

Several of the exceptions taken are abandoned, because not brought forward in the defendant's brief. Rule 34. Those not thus abandoned, and not discussed by us above, are without merit.

No error.

PLAINTIFF'S APPEAL.

1. **Measure of Damages—Past and Prospective—Permanent Injury —Evidence.**

Upon an issue addressed to the quantum of damages, in an action for personal injuries, it is error to charge the jury that the inquiry could not extend to the future, but should be limited to damages sustained in the past, thus basing the charge solely upon the testimony of a physician that the injuries were not of a permanent character, when there is other evidence tending to show that the injuries were of a permanent character.

2. **Same.**

As a measure of damages for personal injuries, negligently inflicted, the injured party is entitled to recover for past and prospective loss resulting from the wrongful act, including indemnity for actual expense incurred in nursing, medical attention, loss of time, loss from inability to perform mental or physical labor, incapacity to earn money, and for actual suffering of mind and body, when they are the immediate and necessary consequences of the negligent injury.

3. **Appeal and Error—Issues, New Trial as to Some—Discretion of Supreme Court.**

It is within the discretion of the Supreme Court to grant a new trial upon one or more issues, and let the others stand, when it clearly appears that the matters involved are entirely separate and distinct from the matters involved in the other issues, and that a new trial can be had without danger of complications with other matters; especially so when both sides appeal in an action for damages for personal injuries sustained, and error is found only in the plaintiff's appeal upon the measure of damages.

CLARK, C. J. The Court instructed the jury: "Whatever you may allow, if you do allow damages, is the end of it. He could not sue any more if his pain and suffering were to go on. The doctor says that the injury is not permanent. The presumption is that it is ended. If you allow damages, therefore, you will not allow for any pain, or suffering, or diminished capacity for labor beyond the present. Your inquiry as to damages will not extend to the future, but shall be limited to such damages as he has sustained up to the present moment." The plaintiff's exception to this must be sustained. There was other evidence for the plaintiff that his injury was permanent. It was error to take the doctor's opinion as conclusive. It was error to hold that there was a presumption that all the injury was ended. It was also error to charge that the inquiry as to damages could not extend to the future, but should be limited to the damages sustained up to the trial.

The true rule is, that where the plaintiff has been injured by the negligent conduct of the defendant, he is entitled to recover damages for past and prospective loss, resulting from the defendant's wrongful and negligent act; and this may embrace indemnity for actual expense incurred in nursing, medical attention, loss of time, loss from inability to perform mental or physical labor, and of capacity to earn money; and for actual suffering of body and mind, which are the immediate and necessary consequences of his injury. *Wallace v. R. R.,* 104 N. C., 442; *Hansley v. R. R.,* 115 N. C., 611: 3 Sutherland on Damages, 261 (1st Ed.); *Burns v. R. R.,* 125 N. C., 309.

These errors affect only the issue as to damages and in no wise relate to the findings upon the other issues. In such cases, the Court, in its discretion, usually grants a new trial only upon the issue as to damages. The practice is thus stated in *Hall v. Hall,* 131 N. C., 186 (in a case in which the issues were not as severable and distinct as an issue as to damage usually is from the issues determining liability): "It is in the power of the Superior Court to grant a new trial on one or more of several issues and to let the verdict on the other stand (*Benton v. Collins,* 125 N. C., 90; 47 L. R. A., 33, and a list of cases there cited), but this is in the discretion of the Court and not a right of the party (*Nathan v. R. R.,* 118 N. C., 1070), and it must clearly appear that the matter involved is entirely distinct and separate from the matters involved in the other issues, and that the new trial can be had without danger of complications with other matters." When such is the condition, the almost uniform practice in this Court also is, in its discretion, to restrict the new trial to the issue or issues affected by the error. See *Strother v. R. R.,* 123 N. C., 199, and numerous cases there cited. To same effect, *Gray v. Little,* 126 N. C., 385; *Wilkie v. R. R.,* 128 N. C., 114; and many other cases since.

This is especially a case in which the new trial should be limited to the issue as to damages, for the defendant excepted and appealed, and on examination of his exceptions we found no error as to the other issues. We grant a new trial on the only issue brought up for review by plaintiff's appeal.

Partial new trial.

S. W. CROMER et al. v. C. C. SELF.

(Filed 19 November, 1908).

Exemptions — Fugitive From Justice — Evidence — Animus Revertendi.

One who is a fugitive from justice, though leaving his family here, who cannot be found in the State and whose whereabouts are unknown, and the object of whose absence is to avoid serving a criminal sentence imposed by our Courts, is not a resident of the State within the meaning of Art. 10, sec. 1, of our Constitution, and not entitled to his exemptions here in the absence of evidence or finding on the question of his animus revertendi.

ACTION heard on appeal from a Justice of the Peace by *Jones, J.*, upon facts agreed, September Term, 1908, of FORSYTH.

The plaintiffs as creditors of the defendant sued out writs of attachment, which were levied upon personal property belonging to the defendant in the city of Winston, under five hundred dollars in value.

There were several causes of a like nature pending which were consolidated with this. The defendant, through his attorney, moved to vacate the attachments upon the ground that he was not a non-resident, and that he was entitled to his personal property exemption.

Defendant appealed.

Watson, Buxton & Watson for plaintiffs.
Louis M. Swink for defendant.

BROWN, J. On appeal to this Court the defendant assigned error as follows:

1. That his Honor erred, in that he failed to dismiss the warrant of attachment, issued in this cause, on the ground that the defendant, at the time of issuing the said warrant, was not a non-resident, and that the property was not subject to attachment.

2. For that his Honor erred in holding that the defendant was not entitled to his personal property exemptions of $500 out of the property attached.

It appears from the facts agreed that the defendant had been a resident of the State of North Carolina all his life up to the date of his leaving, and was a merchant in the city of Winston, N. C., for many years; that at July Term, 1907, of the Superior Court of Forsyth County, he was convicted of fornication and adultery and sentenced to twelve months on the county roads and, at the same term of court, an indictment was returned by the grand jury for larceny; that immediately after the term of court in which the defendant was convicted and said indictment was found, defendant offered to sell his property to Cromer Bros. Co., stating that he would have to leave the State; that immediately thereafter defendant fled the State to avoid the consequences of sentence and indictment, and was absent at the time the warrants of attachment were issued, and is now absent, and his whereabouts is unknown; that the summons in each of these actions was returned by the constable, endorsed "not to be found in Forsyth County"; that the defendant's wife and children are now living in Winston, N. C., and have been living in said city all the time; that prior to the sale the defendant Self, through his counsel, demanded his personal property exemptions out of the property levied on, but the constable refused to allot same, but sold all the property, contending that the defendant was not entitled to personal property exemptions, but was a non-resident of the State.

The only question presented by the assignments of error relates to the status of the defendant. Upon the facts agreed is he, within the spirit and meaning of the Constitution, a resident of this State? Is he entitled to have his personal property exemption set apart in the fund from the sale of the goods?

The counsel for the defendant contends that the question presented has been heretofore decided adversely to the plaintiffs in the case of *Chitty v. Chitty,* 118 N. C., 647. It is true in that case a question somewhat similar was considered by the Court, but the Court was divided and the views of the dissenting Justice are set forth strongly and with much weight of authority. But we are not called upon to determine how much weight we will give the case as a precedent in determining this, for the facts are essentially different. In the *Chitty Case* it is found as a fact that the plaintiff, who claimed his homestead, temporarily absented himself to avoid service of a warrant "with the intention of returning as soon as the case against him should be thrown out of court"; "that the plaintiff spent his time in visiting relatives in various States intending to return," etc.

Thus we see that in the *Chitty Case* a most important fact is found in the claimant's favor, and that is the *animus revertendi.* "A man retains his domicil if he leaves it *animo revertendi.*" 4 Blackstone, 225; 2 Russel on Crimes, 18; 3 Rawle, 312.

In this case there is not only no such finding, but the facts fully justify the conclusion that the defendant fled the State with no intention to return and serve the sentence which the law has imposed upon him. There is no finding that he is temporarily absent visiting relatives but, on the contrary, it is admitted that his whereabouts is unknown.

Assuming that he may be technically a citizen of the State, he is not a resident within the meaning of Art. 10, sec. 1, of the Constitution, and only a resident can claim the benefit of our exemption laws. The defendant is not temporarily absent to avoid service of process. From the time of his escape, after sentence pronounced condemning him to an ignominious punishment, he has been a fugitive from justice, for that alone can save him from the vengeance of the law. The motive that led to his flight will induce him to continue his residence beyond the confines of the State indefinitely, for in no other way can he avoid the punishment due to his crime.

He has left the State to escape the consequences of his crime and stands in the attitude of defiance to her power. It is not for such that our benevolent exemption laws were made. The fact that his family may continue to reside within the State, and that his domicil may be technically here until he acquires another elsewhere, is not enough under the circumstances to render him a resident of this State, for a person may have his domicil in this State and be at the same time a resident of another. *In re Thompson*, 1 Wend., N. Y., 43; *Frost v. Brisbin*, 19 Wend., 11; *Haggart v. Morgan*, 1 Seld., N. Y., 423.

The identical question presented on this appeal was decided by the Supreme Court of New York in *Mayor v. Genet*, 11 Supreme Court Reports (4 Hun., 487), 63 N. Y., 646, in an opinion which fully sustains the view we take.

There are a number of authorities cited in the dissenting opinion of *Clark, J.*, in the *Chitty Case* which fully accord with our judgment in this.

The judgment of the Superior Court is

Affirmed.

H. H. BECK, Administrator, v. SOUTHERN RAILWAY COMPANY.

(Filed 19 November, 1908).

Contributory Negligence—Evidence Conclusive.

When it appears that plaintiff's intestate was injured by attempting to go between two cars of defendant's train, chained together on a live track in constant use, and that he could easily have walked around the train by going from seventy to ninety feet and have avoided the injury, his act constitutes contributory negligence which bars recovery by his administrator.

ACTION tried before *Councill, J.*, and a jury, February Term, 1908, of ROWAN. Defendant appealed.

R. Lee Wright and *P. S. Carlton* for plaintiff.
Linn & Linn for defendant.

PER CURIAM: When this case was before this Court at the last term the judgment of nonsuit was set aside, and a new trial was ordered.

On this second trial the evidence relating to the conduct of the intestate as bearing upon the issue of contributory negligence is much clearer and stronger.

It now appears not only from the evidence offered by the defendant, but also plainly from the evidence of the plaintiff, that the deceased by walking from seventy to ninety feet could easily have walked around the train of cars and that he had a perfectly safe way to reach his home instead of climbing between the two cars chained together on the live track in constant use. Upon all the evidence as presented on the second trial we are of opinion that the deceased was guilty of contributory negligence, and that the motion to nonsuit should have been granted.

It is so ordered.

Reversed.

GATTIE A. BAILEY, Administratrix, v. NORTH CAROLINA R. R. COMPANY.

(Filed 19 November, 1908).

1 **Railroads—Duty to Employees—Trespassers.**

A railroad company does not owe the same duty to one who has surreptitiously climbed, in the night, upon the tender of its switching engine, being used around its extensive and dangerous railroad yards at its station, as it does to its employees; and no invitation to do such an act can be implied from such conditions and surroundings.

2. **Railroads—Wanton Negligence—Evidence—Insufficient.**

Mere forgetfulness, whatever the consequence, does not constitute a wilful or wanton neglect of duty; for the words imply that the act was knowingly and purposely done. Therefore, when the evidence does not disclose that leaving a switch open, which caused the injury, was knowingly done, or done in utter disregard of the consequences, it is not sufficient to sustain a verdict for damages found to be occasioned by "wanton negligence" on the part of the railroad company, or its employees.

3. **Pleadings—Allegations—Proof—Evidence.**

Allegations of the complaint sufficient to sustain a verdict of damages for wanton negligence are ineffectual when not sustained by the proof.

ACTION tried before *Moore, J.*, and a jury, at the February Term, 1908, of GUILFORD.

The action was brought by plaintiff as administratrix of her son, W. L. Bailey, for damages for the death of intestate, alleging that the same was caused by the wilful negligence of the defendant's lessee, the Southern Railway.

The Court submitted these issues:

"1. Was the plaintiff's intestate injured and killed by the wanton negligence of the defendant's lessee? Answer: 'Yes.'

"2. What damage, if any, has plaintiff sustained? Answer: '$7,000.' "

At the conclusion of the evidence the defendant moved to nonsuit. Motion denied. Defendant excepted. From the judgment rendered the defendant appealed.

The facts are stated in the opinion of the Court.

Stedman & Cooke for plaintiff.
Wilson & Ferguson for defendant.

BROWN, J. The lessee of the defendant operates certain large switching yards near Greensboro, called the Pomona Yards, in which are laid a number of parallel tracks upon which are constantly running the switch engines, transfer trains and the other trains of the company.

Two of these tracks are known as the main line tracks, one for southbound and the other for northbound trains.

There is a crossover switch used by trains when necessary in crossing from one main line track to the other.

The plaintiff's intestate was on switch engine No. 1688 on the night of 11 February, 1906, and was killed in a collision near this switch in the Pomona Yards with train No. 34, a northbound passenger train.

The evidence offered in the case, except one rule of the company, was introduced by plaintiff.

All the evidence bearing on this unfortunate disaster is that of C. T. Malcolm, a brakeman and a survivor of the crew of the wrecked switch engine, who testifies, substantially, as follows: "I was working on the yard at Greensboro on 11 February, 1906. Was on engine No. 1688, a switch engine. I was at the yard about the time, or just before, train No. 34 was due from the South, and went with the engine to the coal chute after water. There are parallel tracks in the yard, southbound track and northbound track; all trains going from Greensboro to Charlotte go on the south bound and all trains coming to Greensboro from Charlotte, on northbound. The track that lies nearest south is the northbound track; the track that lies nearest north, is the southbound. Engineer Sellers, Conductor Newman, Cary

Saunders and myself were on the switch engine. As we were going down to get water, we saw another train going up toward the yard; a transfer crew was standing on southbound main line when we came out of the new yard; that transfer train had somewhere between twenty-five and fifty cars. The engine was shoving the cars. The engineer of the train was Mr. Allred, and the brakemen were Will Logan and C. T. Welker.

"When an engine is proceeding backwards through a switch, the rear man opens it; the one next to the engine is supposed to close it. C. T. Welker was the front brakeman on this train.

"After we had gotten water, I first saw the deceased, W. L. Bailey, when we were about two-thirds of the way back to the new yard; he came over the back of the tender and sat down on the coal gate of the tender. As we got to the switch we could see the headlight of No. 34 coming toward Greensboro; just ahead of us was the switch. Somewhere between five and fifteen minutes before we got to the switch, the transfer train had backed through there, it went across. When No. 34 got to the place where the switch was, it came through the switch, it went from the northbound track to the southbound track and there was a wreck with the switch engine No. 1688. I had seen W. L. Bailey just before this wreck, from a minute to three minutes before. The last I saw of him he was sitting on the coal gate; a gate that holds the coal in the tender. He was laughing and talking with Conductor Newman and Fireman Johnson; they are both dead. Henry Sellers, who was on the engine, is dead. All killed at that wreck. I was in about thirty feet of the engine when the wreck occurred, was going toward the switch. I do not know, but the switch must have been open. I saw the switch after the collision, somewhere less than fifteen minutes. I think Mr. Hinton was with me, Mr. Hinton and all met at the switch about the same time. It was open at that time.

The lock was found at the switch stand. I saw the lock, it was not mutilated.

"I saw Bailey after the wreck, he was down in the coal; I did not see him taken out."

Upon cross-examination the witness stated that Bailey, the deceased, was not a member of the switch engine crew. The first thing he saw of W. L. Bailey after they got the water, was when the pipe was thrown around and some water was thrown over the back of the tender, and the engineer, who was giving the engine water, remarked that he came mighty near drowning somebody. After the engine started to the new yard and while the engine was going up to the yard, W. L. Bailey climbed from back of the tender over on the coal and sat down on the coal. No one gave him permission to come on the engine.

The witness further testifies: "I do not know whether the switch was left open or not; I could not say that it was left open; I don't know whether it was locked at the time the collision occurred or not; I do not know whether the lock was taken out afterwards and laid *down there* or whether it was out at the time of the collision. I do not know who left the switch open, if it was open. Neither I nor any member of the crew of the engine I was on knew anything about it being open. I do not know whether No. 34, when it came in, ran through an open switch or from some other reason it crossed over."

The witness further said that the transfer train Welker was on had passed over the switch "about fifteen or twenty minutes" before the collision, and that it was Welker's duty when his train passed to close the switch.

The rules of the company introduced in evidence require that switches be kept locked for the main track, except when passing trains to or from another track, and also forbids any person to ride on the tenders and engines of the company, except certain designated employees and officials.

It is admitted in the record that the deceased was not an employee of the company.

1. It must be conceded at the outset that the company did not owe to the deceased the duty it owed its employees rightfully on the switching engine, for the deceased was wrongfully there, and in violation of the company's rules, a copy of which was found in his possession.

He was a trespasser in entering upon the company's switching yards and climbing up at night on the back of a moving tender. He was not invited by the crew, and they had no such authority. *Vassor v. R. R.,* 142 N. C., 68; *Peterson v. R. R.,* 143 N. C., 260.

Not only did the published rules of the company prohibit such conduct, but the dictates of common prudence forbade it. In a railway switching yard in which there are numerous tracks in constant use for the purpose of switching cars, making up trains, and the like, and where the extremely dangerous character of the place is perfectly manifest to all, there can be no implied license to the public to enter. *R. R. v. Rylee,* 87 Ga., 491; *Wagner v. R. R.,* 122 Iowa.

And certainly, for still stronger reasons, there can be no implied license to climb up surreptitiously on the company's engines and tenders and distract the attention of the crew from their exceedingly important duties.

2. There is no evidence that the deceased was killed by any wilful or wanton negligence of the defendant's lessee, and therefore his Honor should have sustained the motion to nonsuit.

There is evidence tending to prove that the transfer train passed over the switch from fifteen to twenty minutes prior to the collision, and that it was Brakeman Welker's duty to close the switch. Although there is no positive evidence, it may be inferred from the fact that the switch was open that Welker failed to lock it when his train passed over, but there is a conspicuous absence of any fact tending to show why he failed to lock it.

So far as the evidence discloses, it was the old case of "I forgot," which has cost thousands of lives before this sad occurrence took place. We have in the books other cases where engineers, conductors and switchmen have forgotten their orders and brought disaster to themselves, their passengers and employers. But mere forgetfulness, however grievous the consequences, does not constitute a wilful or wanton neglect of duty. The Indiana Court says, that "to constitute a wilful injury the act which produced it must have been intentional, and must have been done under such circumstances as evinced a reckless disregard for the safety of others, and a willingness to inflict the injury complained of." *R. R. Co., v. Bryan,* 7 N. E. Rep., 808. To same effect is *R. R. Co. v. Murphy,* 9 Bush., 528; *R. R. v. Filburn,* 6 Bush., 574; *Bridge Asso. v. Loomis,* 20 Ill., 236; Beach on Neg., sec. 64.

The term "wanton negligence" (whether correctly joined it is needless to discuss) always implies something more than a negligent act. This Court has said that the word "wanton" implies turpitude, and that the act is committed or omitted of wilful, wicked purpose; that the term "wilfully" implies that the act is done knowingly and of stubborn purpose, but not of malice. *State v. Massey,* 97 N. C., 468; *State v. Brigman,* 94 N. C., 888.

Judge Thompson says: "The true conception of wilful negligence involves a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another, which duty the person owing it has assumed by contract or which is imposed on the person by operation of law."

"Wilful or intentional negligence is something distinct from mere carelessness and inattention, however gross."

"We still have two kinds of negligence, the one consisting of carelessness and inattention whereby another is injured in his person or property, and the other consisting of a wilful and intentional failure or neglect to perform a duty assumed by contract or imposed by operation of law for the promotion of the safety of the person or property of another." Thompson on Neg. (2 Ed.), sec. 20, *et seq.*

It was held in the case of *Bowlin v. R. R. Co.,* 19th American and English Railroad Cases (new series), pp. 735 to 749, that a trespasser could not recover for an injury alleged to have been caused by the wanton negligence of the railroad through its conductor, "unless the misconduct of the trainman was of that degree necessary to render the fact that the deceased was a wilful trespasser immaterial, that is, unless his conduct was such as to evince an intention to injure the deceased or such an utter disregard of the consequences of his act as to indicate that willingness to injure him, which is equivalent in respect to legal damages to intent to procure the result."

The fact that the complaint charges that the act of omission imputed to Welker was wilfully, recklessly as well as wantonly done, does not help the plaintiff, even if such words were all used in the issue.

The word "recklessly," when used conjunctively with wantonly, always means something more than negligently; the two words thus conjoined can never import less than such conscious disregard of or an indifference to the probable consequences of the act to which they refer as is the legal equivalent of wilful misconduct and intentional wrong. *R. R. v. Robinson,* 19th American and English Railroad Cases, N. S., p. 357.

The plaintiff must do more than characterize the alleged omission of duty upon the part of Welker in her complaint. She must offer evidence tending to give it the character she imputes to it.

There is no evidence of a deliberate or wilful purpose on the part of any employee of the defendant's lessee to injure plaintiff's intestate, or of a wilful or conscious indifference to consequences whereby plaintiff's intestate was killed; there is no evidence that Welker knew that engine No. 1688 was standing on the southbound track near the switch, or that the intestate was on it; on the contrary, it appears that the switch engine passed the transfer train while on its way to Greensboro for water, and the transfer train had passed through the crossover switch before said engine returned to the switch. There is no evidence that Welker or any of the crew of the transfer train knew that train 34 was coming in on the northbound track shortly thereafter; the only evidence that the switch was left open is that it was found open fifteen minutes after the wreck, and there were from five to fifteen minutes between the time the transfer train passed through the switch until the wreck, so that the switch was found open from twenty to thirty minutes after the transfer train had gone through.

Conceding that Welker left the switch open, this evidence does not at all negative the fact that it was mere forgetfulness or a careless mistake having no evil intent or purpose, nor any *consciousness* of probable injury.

The Court below erred in refusing the motion to nonsuit.

It is so ordered.

Reversed.

HOKE, J., concurs in result.

E. H. WADE, by his next friend, A. T. MOORE, v. McLEAN CONTRACTING COMPANY.

(Filed 19 November, 1908).

1. **Pleadings—Admissions—Evidence.**

   It is competent for one party to put in evidence a portion of the pleadings of the other containing an allegation or admission of a distinct or separate fact relevant to the inquiry, though it is only a part of the entire paragraph, without introducing qualifying or explanatory matter inserted by way of defense, which does not modify or alter the facts alleged.

2. **Defenses—Fellow Servant Act—Railroads.**

   The defense that the injury complained of resulted from the negligent act of a fellow servant is still available, except in its application to a railroad company; for, by express terms, the statute known as the "Fellow Servant Act," by which this defense was withdrawn, is confined in its operation to railroad companies.

3. **Master and Servant—Negligence—Fellow Servant—Vice Principal—Respondeat Superior.**

   When an order negligently given by a vice principal, present at the time and directing the work, obediently carried out by one fellow servant, immediately caused the injury to the other one, the negligence is imputed to the principal, and a prayer for instruction is properly refused, to the effect, that if the plaintiff was injured, under such circumstances, by the misconduct of a co-employee, he could not recover.

4. **Master and Servant—Negligence of Fellow Servant—Recovery.**

   In an action by an employee to recover damages for personal injury alleged to have arisen from a negligent act, if the negligence of the employer and a fellow employee concurs in producing the injury, the injured employee can recover of either, if he himself is free from blame.

5. **Same—Evidence—Nonsuit.**

   The plaintiff, nineteen years of age, was employed chiefly to keep the books of defendant company. The vice principal of defendant, who was directing the work, called plaintiff to assist in raising a pile driver by helping to work some jackscrews, placed for the purpose. There was evidence tending to show that the injury complained of was caused by the jackscrew being insecurely placed and certain timbers used in connection with them insecurely fastened; and in consequence of an ill-considered and negligent order, given by the vice principal. *Held*, there was sufficient evidence of negligence to be submitted to the jury, and a motion as of nonsuit upon the evidence was properly refused.

ACTION, tried before *W. R. Allen, J.,* and a jury, Spring Term, 1908, of CARTERET, to recover damages for personal injuries, caused by alleged negligence of defendant company.

There was evidence to show that plaintiff, nineteen years of age, employed chiefly to keep the books of defendant company, and do other work, was called upon by Mr. Crow, who was directing the work at the time for defendant company, to assist in raising a pile-driver, and this by working some jackscrews a few feet apart, and placed under two heavy pieces of timber, twenty-four feet in length, one end of the pieces being a foot or so under the object and the other ends being raised something like ten feet from the ground.

There was further testimony tending to show, that said Crow stood towards plaintiff, and other hands there employed, as vice-principal of defendant company, and that he was present at the time, exercising personal supervision of the work, and giving immediate directions concerning it; that the jackscrews were improperly placed and the timber insecurely fastened, and that, by reason of these facts and of an ill considered and negligent order on the part of Crow, one of the pieces of timber became loose, the elevated end swinging around striking plaintiff and inflicting the injuries complained of.

In the presentation of plaintiff's case, he was allowed, over defendant's objection, to put in a clause from defendant's answer by way of admission to the effect, "that plaintiff in discharge of the duties of his employment, under the direction of J. M. Crow, foreman, was working with one Charles Bennett." The exception being made on the ground "that a part of the section could not be admitted without the whole."

On issues submitted, the jury rendered the following verdict:

"1. Was plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: 'Yes.'

"2. Was plaintiff guilty of contributory negligence? Answer: 'No.'

"3. What damages, if any, is plaintiff entitled to recover therefor? Answer: '$720.'"

There was judgment on the verdict for plaintiff, and defendant excepted and appealed.

Simmons, Ward & Allen and *D. L. Ward* for plaintiff.
Moore & Dunn for defendant.

HOKE, J., after stating the case: In *Sawyer v. R. R.,* 145 N. C., 24, the approved rule in reference to the admission of excerpts from pleadings by way of admission, is stated as follows:

"It is competent for the plaintiff to put in evidence a portion of the answer containing an allegation or admission of a distinct or separate fact relevant to the inquiry, though it is only a part of an entire paragraph, without introducing qualifying or explanatory matter, inserted by way of defense, which does not modify or alter the fact alleged." And its correct application here sustains the ruling of the Judge admitting the excerpt from the answer offered by the plaintiff.

It was further contended by defendant, that as the statute, known as the Fellow Servant Act, is confined in its operation to railroads, the defense which arises under certain circumstances by reason of the negligence of a fellow servant, is available to defendant. The position is correct so far as relates to the statute in question. In express terms, the act is restricted to railroads and their employees, but the facts of the case do not require or permit the application of the doctrine referred to, for the evidence is to the effect that J. M. Crow, who held the position of vice-principal towards the plaintiff and the other employees, was present, exercising personal supervision of the work in which these hands were employed, and that he gave the order which immediately caused the injury. The physical act may have been that of Bennett, the co-employee, but the order was given by Crow, the vice-principal, and, if it was negligently given, the result is imputable to defendant, for there is no suggestion or claim that Bennett acted in disobedience of Crow's order, or that he failed to carry it out. And, if it were otherwise, if the evidence tended to show that the plaintiff's injury resulted as the proximate consequence of negligence on the part of Crow, the vice-principal, and that a negligent act of Bennett, the co-employee of plaintiff, concurred in bringing it about, in that event, defendant would be responsible. For it is recognized doctrine that if the negligence of the employer and a fellow employee concurs in producing an injury, the injured employee can recover of either if he himself is free from blame.

As stated in 12 A. & E. (2d Ed.), p. 905: "A master is liable for an injury to his servant, caused by the concurrent negligence of himself and a fellow servant, but which would not have happened had the master performed his duty. And it is only when the negligence of the fellow servant is the whole cause of the injury that the master is excused."

The Court, therefore, made a correct ruling in refusing to give defendant's prayer for instructions to the effect, "that if plaintiff was injured by the misconduct of a co-employee, he could not recover." And the defendant's motion to nonsuit was also properly overruled. There was evidence tending to show negligence on the part of defendant, both in the means provided for the work, and the method and manner of conducting it, and the facts presented required that the cause should be submitted to the jury.

There is no error, and the judgment below is affirmed.

No error.

W. R. KUKER v. H. N. SNOW.

(Filed 19 November, 1908).

Contracts—Options—Rights of Parties.

Defendant contracted with N. Bros. to give them an option on his stock, in an incorporated company, with the privilege of buying at any time within three years. He afterwards placed the stock in the hands of a trustee for the purpose of securing the performance of a contract made with K with direction to sell to "some parties agreeable to N. Bros." In an action by K against defendant, and the trustee, to compel the latter to sell the stock, N. Bros. were made parties defendant and asserted their rights under the option contract. *Held*, that an order to sell the stock should not have been made until the rights of N. Bros. had been passed upon. K and the trustee took the stock subject to the rights of N. Bros.

ACTION heard by *Webb, J.*, March Term, 1908, of DURHAM.

The plaintiff alleged that, on 21 February, 1907, he entered into a contract, in writing, with defendant H. N. Snow, which he sets out in the complaint. He contracted to sell to defendant Snow ninety-one shares of the capital stock of the Durham Iron Works Company, of the par value of $9,100, "for the following price, to-wit: thirty-five hundred dollars in cash and sixty shares of the capital stock of the Durham Book and Stationery Company of the par value of $3,000. * * * It is mutually agreed between the parties hereto, that said H. N. Snow shall deliver said $3,000 of the capital stock in said Durham Book and Stationery Company to W. B. Guthrie, Esq., to be held by him and sold for the benefit of said Kuker, to some party or parties agreeable to the Mess. Newsome Bros., and the said Snow agrees, on his part, that the said stock shall net Kuker $3,000 in cash. It is further agreed by the parties hereto, that this agreement shall be perfected and carried out in every detail, within six days from this date." Pursuant to said contract, plaintiff delivered to defendant Snow the shares of stock in the Durham Iron

Works, and Snow paid plaintiff $3,500 cash. He also delivered to Mr. Guthrie $3,000, par value, of stock in the Durham Book and Stationery Company. Although more than ninety days have elapsed since said agreement was made, said Guthrie "has failed and refused to sell said stock and pay the amount received to plaintiff, although demand has been made upon both defendants Snow and Guthrie to carry out the terms of said contract. Plaintiff demands judgment against Snow for $3,000 and interest, and against Guthrie that he sell said stock and apply the proceeds to the payment of the judgment against Snow. At the January Term, 1908, the Court made an order that notice issue to Newsome Bros. to appear, and show cause why they should not be made parties and be bound by the judgment in this cause. No exception was made to this order, and it does not appear at whose instance it was made. Notice having been served, they were made parties defendant. The defendants Snow and Guthrie filed an answer admitting the execution of the contract and the delivery of the stock to Guthrie in accordance therewith. For a defense, they alleged that, some time prior to the execution of the contract, defendant Snow had sold to Newsome Bros. a controlling interest in the Durham Book and Stationery Company, retaining $3,000 of the stock; that he entered into a written contract with said parties, whereby he agreed that said Newsome Bros. "are to have the privilege of purchasing the said sixty shares of stock now held, or any stock which may hereafter be acquired, or which may now be retained by said H. N. Snow and H. N. Snow, Jr., and Mrs. H. N. Snow in the aforesaid company, at any time within the next three years if they may so desire, upon the payment to said H. N. Snow, H. N. Snow, Jr., and Mrs. H. N. Snow, of the par value of said stock" (this agreement is dated 3 January, 1907); that at the time defendant Snow entered into the contract with plaintiff, he advised and informed him personally of the contract with Newsome Bros., in regard to the sale of said stock, and that he told him if he, plaintiff, took said stock, he would do so subject to the said prior option contract, to all of which plaintiff then and there assented; that Newsome Bros. have never waived their option, nor have they assented that said stock should be sold to any other person. Defendants say that they are ready and willing to carry out the contract, so far as they may be able, in a lawful way, to do so. They ask to be protected and saved harmless on account of the prior option contract.

Newsome Bros., in accordance with the notice served on them, came in and filed an answer, setting up the contract referred to in the answer of Snow and Guthrie. They allege that they have not waived their rights under said contract, but, on the contrary, assert them by claiming the right to buy said stock at any time within three years from 3 January, 1907. Plaintiffs replied to the new matter set up in the answer of defendants Snow and Guthrie, denying all knowledge of the contract with Newsome Bros., and alleging that they are not parties thereto nor affected thereby.

His Honor rendered judgment upon the pleadings, that defendant Guthrie sell the stock deposited with him, pursuant to the terms of the contract between plaintiff and defendant Snow, of 21 February, 1907; that he advertise the sale for thirty days and make report of the price, etc., to the next term of the court; that the cause be retained for further orders. To this judgment defendants excepted and appealed.

Manning & Foushee for plaintiff.

Guthrie & Guthrie and *R. O. Everett* for defendant.

CONNOR, J., after stating the facts: The appeal presents the question whether, in the light of the pleadings, his Honor was correct in rendering the judgment set out in the record. For the purpose of disposing of this question, the allegations in the answers must be taken as true. So taken, they present a peculiar series of contracts on the part of defendant Snow.

He enters into the contract with Newsome Bros. on 3 January, 1907, giving them an option on the stock, at par, for three years. On 21 February, 1907, he enters into a contract with plaintiff, placing the stock in the hands of Mr. Guthrie to sell in six days, "to some party or parties agreeable to Mess. Newsome Bros." We cannot ignore this limitation upon Guthrie's power to sell. If nothing else appeared, before plaintiff could enforce a sale he would have to allege and prove that Guthrie had failed or refused to make an effort to make a sale to "parties agreeable to Newsome Bros." The limitation put Guthrie upon notice that, in some way, Newsome Bros. were entitled to be consulted in finding a purchaser or, at least, that the person who purchased should be agreeable to them; otherwise the language, in that respect, has no significance. If he should disregard the limitation upon his power to sell, he might incur liability either to Newsome Bros. or, if they had a prior right to the stock, to the purchaser. Of course, he could not arbitrarily refuse to act in the premises. It is true that plaintiff alleges that he has demanded of Guthrie to sell the stock, but he does not allege that a sale can be made, in accordance with the terms of the contract, to some person agreeable to Newsome Bros. This, however, is not all that appears. It is alleged in the answer that Newsome Bros. have the right to purchase the stock, at par, at any time within three years, and that plaintiffs had notice of this right and made the contract subject to Newsome Bros.' option. This allegation is denied by plaintiff. Before any order of sale is made or final judgment rendered, this issue of fact should be settled by the jury.

We forbear discussing the question respecting the right of Newsome Bros. to demand specific performance of the contract with Snow, and to that end to enjoin the sale until the expiration of their option; also whether a purchaser from Snow or from Guthrie, trustee, would take the stock subject to Newsome Bros.' rights. In the light of Snow's guaranty that the stock shall bring par value when sold, and that he will make good any deficiency to the extent of $3,000, it is difficult to see how he is interested in delaying a sale. In any event, he is liable to plaintiff for $3,000, the only question being whether he can, if he can make good his allegation, postpone the sale for three years, or until Newsome Bros. see fit to close their option either by taking the stock at par, or surrendering their claim to it. The judgment of his Honor must be set aside and a new trial had, to the end that the controverted matters may be settled. It is so ordered.

New trial.

LOUISE B. SMITH v. SUSAN E. MOORE.

(Filed 19 November, 1908).

1. **Deeds and Conveyances—Fraud—Transactions With Deceased Persons—Place of Signing—Harmless Error.**

   When there is no controversy as to the fact, and it is immaterial to the issue and non-prejudicial, where the deceased was when he signed a deed, in an action attacking its validity for fraud, admission of evidence that it was signed in bed is not reversible error, upon the ground that the testimony concerned a transaction between the witness and the deceased.

2. **Deeds and Conveyances—Evidence—Declarations Explanatory of Possession—Res Gestae.**

   While the issue of fraud is one to be passed upon by the jury, in an action wherein the validity of a deed is attacked on that ground, declarations that the deed was procured by fraud, when qualifying and explaining the possession and made by the party in possession of the lands claiming them as his own at the time demand therefor was made, are competent as a part of the *res gestae*, the fact of possession, though incompetent as evidence of the alleged fraudulent fact, or as an opinion of how the deed was obtained.

3. **Appeal and Error—Brief—Exceptions Abandoned.**

   An exception appearing of record but not referred to in the appellant's brief, is regarded as abandoned on appeal.

4. **Evidence, Hearsay—Exceptions to Rule—Requisites.**

Parties relying upon an exception to the rule that hearsay evidence is inadmissible, must show affirmatively the existence of all facts necessary to bring the secondary evidence clearly within the exception.

5. **Same—Evidence.**

In order for a party to introduce in evidence stenographer's notes of the testimony of a witness taken at a former trial, it is encumbent on him to show the facts, upon which he relies, as to his being unable to procure the attendance of the witness, or have his deposition taken; and a doctor's certificate, merely to the effect that the witness is too unwell to attend the trial, without having shown previous notice to the opposing party, or without making it appear that the sickness is of a permanent character, is insufficient to bring the evidence within the exception to the general rule that hearsay evidence is inadmissible.

6. **Principal and Agent—Deeds and Conveyances—Delivery—Possession—Registration—Fraud.**

A deed made by an agent, having general control or supervision of his principal's property, to his principal, found in the agent's safe after his death, unregistered, but among other papers, monies, etc., of the principal, without other proof of constructive or actual possession of the principal, would not be a valid delivery, when there was no special authority to the agent to accept the deed in behalf of the principal; and the failure to register was a circumstance to be considered by the jury upon the question of fraud.

7. **Principal and Agent, Transactions Between—Fraud—Presumption—Burden of Proof.**

When one is the general agent of another, who relies upon him as a friend and adviser, and has entire management of his affairs, a presumption of fraud, as a matter of law, arises from a transaction between them wherein the agent is benefited, and the burden of proof is upon the agent to show by the greater weight of the evidence, when the transaction is disputed, that it was open, fair and honest.

ACTION tried before *Neal, J.*, and a jury, Fall Term, 1908, of NEW HANOVER.

This cause has been before the Court in two appeals and will be found reported in 142 N. C., 277 and 145 N. C., 269. On both appeals the Court granted a new trial for error in the conduct of the trial and form of the verdict. The subject matter of the litigation is set forth in the appeal, reported in 142 N. C., 277, rendering it unnecessary to repeat it at this time. Reference may be had to the statement made by Mr. Justice Walker, 142 N. C., 277. The cause was brought to trial for the third time before Judge Neal and a jury, when a verdict was rendered for plaintiff. Several exceptions were taken to his Honor's rulings upon the admission and rejection of testimony, and to instructions to the jury. Those not abandoned in the brief are referred to in the opinion.

From a judgment upon the verdict the defendants appealed.

John D. Bellamy for plaintiff.

Bellamy & Bellamy, Rountree & Carr and *H. McClammy* for defendant.

CONNOR, J. The issue submitted to the jury upon the pleadings presented the question whether the deed executed by plaintiff and her mother, Mrs. Mary E. Smith, was procured by fraud. The defendants claim the property as the widow and heirs of Roger Moore, the grantee. It is conceded that every person present at the execution of the deed, except plaintiff and Alcenia Reed, are dead. Plaintiff was introduced in her own behalf, and testified, without objection, that, at the time she executed the deed, she was sick—was very ill with typhoid-pneumonia—from February to April, 1885, the date of the deed being 4 March, 1885. She was asked: "Where were you when you signed the paper?" to which she responded, over defendant's objection, "In the bed." Defendants excepted. The ground of the exception is that the testimony concerned a transaction between witness and the ancestor of defendants, the grantee in the deed. It was, in regard to the matters in controversy, entirely immaterial whether plaintiff was sitting on a chair or lying on a bed when she signed the deed. We do not perceive how the fact could throw the slightest light upon the issue or prejudice the defendants. While we do not think that the testimony comes within the spirit or the language of the statute, Revisal, sec. 1631, as a communication or transaction with the deceased grantee, if it did we should not deem its admission ground for granting a new trial—it is clearly non-prejudicial. The witness Alcenia Reed, who was present, testified, without objection or contradiction, that plaintiff was "in the bed" when she signed the deed. There was no controversy in regard to the fact. The exception cannot be sustained.

After the execution of the deed, plaintiff and her mother continued to reside upon the property until the latter died. Plaintiff remained there undisturbed by Col. Roger Moore during his life. Some time after his death, Henry Moore, sometimes referred to as Roger, one of the children of Col. Roger Moore, and one of the defendants, went to the home of the plaintiff and demanded possession, or that some arrangement, in regard to the rent, be made. After testifying in regard to the conversation between Henry Moore and herself, plaintiff was asked: "What claim did he set up to the property—what did he say to you and what did you say to him?" She answered, over defendant's objection, "He said he had a deed for the property and I told him if he had, he got it by fraud." Defendants excepted. Of course, it would not have been competent, as substantive evidence, for plaintiff to say that defendants' ancestor procured the deed by fraud. That was the very question to be decided by the jury. She could not state, either as a fact or as an opinion, how the deed was obtained. We do not understand that the question was asked or permitted to be answered for any such purpose. It was clearly competent for her to give her version of the conversation between herself and Henry Moore, one of the defendants, when he claimed the property and demanded possession. It may have been proper for his Honor to have stricken the answer from the record. It was saying nothing more than she had alleged in her complaint, and could not, in the light of the instruction given by his Honor, upon the issue, have misled the jury. The case was made to depend largely upon the presumption of fraud arising out of the relation of the parties. His Honor, in view of the opinion of the Court on the former appeal, carefully excluded any testimony from plaintiff in regard to the transaction between Col. Roger Moore and herself. No reference was made in the conversation with Henry Moore to the circumstances attending the execution of the deed. It is the well settled rule that when one is in possession of land, his acts and declarations qualifying and explaining such possession, are competent as part of the *res gestae,* that is, the fact of possession. Henry Moore was making claim that he owned the land, had a deed for it—demanding that she surrender possession. She simply said: "If you have a deed, you got it by fraud." We cannot think this language constitutes prejudicial error.

The record contains an assignment of error directed to the testimony of plaintiff that she made a will. It is not referred to in the brief and is, therefore, under the rule to be regarded as abandoned.

"Counsel for defendants offered to read, in evidence, the testimony given on the last trial by Mrs. Sarah J. Wilson, upon the presentation to the Court of a doctor's certificate that Mrs. Wilson was too unwell to attend court, for that the evidence (stenographer's notes) was what the witness testified to at last trial. The Court was of the opinion that the evidence was not competent, even though it should be made to appear that the witness was sick, and also that the evidence offered was what she said at a former trial. It was excluded upon plaintiff's objection, and the defendants excepted."

It would have been more satisfactory and better practice for his Honor to have found the facts in regard to the physical condition of Mrs. Wilson, how long she had been sick, the character of her sickness, its probable duration, whether known to defendants and, if so, whether it was practicable to have taken her deposition. This would have enabled him to pass upon the admissibility of her testimony given on the former trial, preserved by the stenographer's notes, as a question of law, and, upon appeal, we could have reviewed his conclusion. His finding of fact would have been final, as in cases of dying declarations, etc. To say that a witness is "sick" or "unable to attend court" is indefinite, and by no means determinative of the admissibility of her former testimony as original substantive evidence. The general rule excluding hearsay evidence is too well settled upon reasons too obvious to justify a discussion or citation of authority. Experience has demonstrated the necessity of some exceptions to the rule. Statutory provisions have been made for taking depositions and prescribing the conditions under which they may be substituted for oral evidence before the jury. The Courts have, with caution, and, because of necessity, made other exceptions. Some of these are as well settled as the rule itself. The testimony of a witness who, since his examination, has died, become insane, or otherwise non-available, may be introduced upon a second trial, provided, it has been preserved or notes taken thereof, or some person who heard the witness testify can reproduce it. There are other exceptions not necessary to be considered in this connection. Illustrations of the exceptions, so far as they have been applied by this Court, will be found in *Jones v. Ward,* 48 N. C., 24, where an attorney who took notes of the testimony on the first trial was permitted to testify to what the deceased witness swore. This ruling was followed in *Wright v. Stowe,* 49 N. C., 516; *Ashe v. DeRossett*, 50 N. C., 299; *Carpenter v. Tucker,* 98 N. C., 316. In this class of exceptions the non-availability of the witness is manifest, the only question being as to the mode of preserving and reproducing the testimony. The Courts have also made an exception when the witness has gone beyond the jurisdiction of the Court without the procurement of the party offering his former evidence, and he has no means of taking his deposition, or when the witness is sick; and probably still others not material to this discussion. In this last class of exceptions the party offering the testimony must, as a condition precedent to its admission, show the necessity for the exception based upon the non-availability of the witness, either in person or by deposition, and that he has used due diligence in endeavoring to secure his attendance or take his deposition. "In case of disability, other than death, it has been held that the Court must be satisfied that the party has used due diligence to obtain the personal attendance of the witness." 1 Elliott Ev., sec. 517. We do not find that the question involved in this case has been decided in this Court. In other jurisdictions it has received careful consideration and has, we think, been settled upon sound principle and safe policy. In *Wabash R. R. v. Miller*, 158 Ind., 174, *Hadley, J.*, says: "The admissibility of such evidence constitutes an exception to the general rule of exclusion of hearsay evidence, and rests upon a kind of legal necessity springing from an apparent impossibility or impracticability of procuring the testimony of the person from whom the information emanates. It is, therefore, incumbent upon the party offering such testimony to show affirmatively the existence of all facts necessary to the bringing of the secondary evidence clearly within the exception, and, unless this is done, the evidence should be excluded." In this case the witness was temporarily absent from the State. No reason being shown why his deposition was not taken, his testimony upon a former trial was excluded. In *Seifert v. Seifert*, 123 Mich., 664, *Grant, J.*, says: "I find no authority which holds temporary illness is sufficient to justify the reading of the testimony taken upon a former trial. When the illness is only temporary, certainly the opposite party should be allowed the choice to consent to a continuance or to the introduction of the former testimony.

* * * The only safe rule is that the illness must be of

a permanent character." In *Berney v. Mitchell,* 34 N. J. L., 337, we find a well considered discussion, citing English and American cases, by *Dalrimple, J.* He says: "It must be recollected that the rule by which the evidence of a deceased witness, given on a former trial, is admitted, is an exception to the rule rejecting all hearsay evidence * * * . In my opinion, neither legal principle nor sound policy will justify the admission of the evidence given on a former trial, except in case of the death or insanity of the witness, or when it appeared at the time of the trial, by reason of physical inability of a permanent character he is unable to be examined and that, by the exercise of due diligence, his deposition could not have been taken." We quote this language to show how cautiously the most respectable courts in this country have proceeded in extending the exception to the general rule. In *Miller's Case, supra,* the Court, referring to the use of stenographer's notes, says: "It is suggested that since the employment of stenographers in court and when testimony which has been sifted and its truth tested by cross-examination, under the supervision of the Court, has been preserved by it, the reasons previously existing for diligence in procuring the evidence, direct from the original witness for use upon a retrial, have ceased to exist, and that evidence so preserved can no longer be looked upon with distrust. But the suggestion does not go to the bottom of the question. A witness may never be more honest in giving his testimony, yet, after the lapse of time and increase of knowledge, he may desire to modify or altogether change the statements made by him as a witness in the case; and the adverse party may desire to cross-examine the witness more at length, or upon new points and may be able thereby to change materially the probative force of the testimony previously given; and grounds of successful impeachment may be discovered after the former trial, which would be made available by presenting to the adversary party an opportunity to lay the foundation. These and other like considerations are not affected by the art of stenography, however perfect it is or may become. It is clearly the duty of the Court, when engaged in the administration of justice, to see to it that the best and most reliable evidence obtainable is brought before it, and this can only be accomplished by requiring, as far as reasonably possible, the examination of the witnesses from the stock of knowledge possessed by them and the parties at the time of the trial." The stenographer's notes, while doubtless accurate, do not have the degree of "circumstantial trustworthiness" which Prof. Wigmore regards as essential to the admission of secondary or hearsay evidence, which a deposition, carefully taken by a commissioner, read over to and signed by the witness, possesses. When a deposition is taken the opposite party is put upon notice that it will probably be offered in evidence, and he is given an opportunity to prepare for trial in view of this fact. We think that, upon the authority of the decisions cited, and upon principle, the defendants did not show to the Court either the legal necessity for admitting the notes of Mrs. Wilson's testimony on the former trial, or that they had used due diligence in securing her deposition, or, if the exigencies of the case rendered this impossible, asking for a continuance of the cause. It was but just to the plaintiff and conducive to the due administration of justice that, in some way, the plaintiff should have been notified that the witness would not be present to testify and that the stenographer's notes would be offered. We place our decision upon the general rule and the exception, subject to the limitation put upon it, and not because we have any thought that the learned counsel for defendants were not acting in perfect good faith in offering the testimony. To enlarge the exception or relax the conditions upon which it may be invoked would endanger the integrity of the rule itself and the rights of parties in trials before juries. *State v. King,* 86 N. C., 603, does not conflict with the conclusion reached by us.

While not next in order, we deem it convenient to consider the exception and assignment of error pointed to his Honor's charge upon the contention that Col. Moore, the grantee, executed and delivered to Mrs. M. E. Smith and plaintiff a lease of the property for their joint lives and the life of the survivor. The plaintiff introduced a paper writing signed by Roger Moore, bearing date of 15 March, 1885, leasing to plaintiff and her mother the property in controversy, reserving a nominal rent. The testimony showed that this paper was in the handwriting of Mr. Cutler, who drew the deed of 4 March, 1885. It was witnessed by him and admitted to probate, and registration by defendants 11 April, 1907, upon proof of his handwriting, he having died prior thereto. The evidence tended to show that Col. Moore was the general agent of Mrs. Smith, and that he kept in his possession, as such agent, her papers; that it was the purpose of Mrs. Smith to reserve, in said property, an estate for the life of herself and her daughter, the plaintiff, and of the survivor. The evidence tended to show that, some time after the death of Col. Moore, the lease was found in his iron safe, in a bundle of papers in an envelope. The words, "Mary E. Smith and Louise B. Smith," were written on the envelope, which was in a tin box containing some silver, etc., the property of Mrs. Smith. The papers were found in Col. Moore's office. The lease was tendered to plaintiff after the death of Col. Moore and she declined to receive it. It does not appear that either Mrs. Smith or plaintiff ever had possession of it. There was very much evidence in regard to the conduct of the parties and their counsel, respecting the possession, etc., of the lease, defendants insisting that the lease was executed by Col. Moore pursuant to the terms of Mrs. Smith's and plaintiff's contract with him, for the purpose and having the effect of vesting in them a life estate in the property, and that the evidence showed a delivery by Col. Moore by placing it in an envelope in his safe among the other papers, etc., of Mrs. Smith; that Col. Moore, being the agent of Mrs. Smith, held the actual possession of the paper for her benefit. Plaintiff denied that such was the contract, contending that she knew nothing of the execution or existence of the lease; that her mother and herself thought that they signed a will and never intended to sign a deed conveying the property. It thus became material to inquire, as an evidentiary fact relevant to the issue, whether the lease had been delivered either to Mrs. Smith or the plaintiff. Mrs. Smith and Mr. Cutler being dead, it was impossible to show by direct evidence what was done by them in respect to the lease. The offer to deliver it to the plaintiff by defendants, after the death of Col. Moore, throws but little, if any, light upon the question. His Honor instructed the jury: "That Roger Moore could not deliver the lease from him to the plaintiff and her mother by simply putting the lease among their papers, but in order to make it effective the jury must find from the evidence that the lease was delivered to them personally, or to their duly authorized agent, and that agent must be some one other than Col. Moore, and a delivery to Mrs. Smith would not be a valid delivery to the plaintiff Louise, unless the jury should find that Mrs. Smith was authorized by the plaintiff to accept the lease for her." This instruction is assigned as error. What constitutes delivery of a deed is a mixed question of law and fact. When the conduct of the parties leaves the question of delivery in doubt, their intent, gathered from their conduct and declarations, control. It is, in all cases, essential to the delivery of a deed that it pass out of and beyond the control of the grantor and into the actual or constructive control of the grantee. So long as the grantor retains control of or the power to recall the possession of the paper, it cannot be said to have been delivered. The *custody* of the deed may remain with the grantor provided the control or power to recall it has passed from him. There must be not only a parting with control of the deed by the grantor, with the present intention that it shall operate as a conveyance of the land, but there must likewise be an acceptance, either by the grantee or by some one for him. Devlin on Deeds, sec. 278, *et seq.* In this case the burden of proof to show that the lease was delivered to Mrs. Smith by Colonel Moore was on the defendants. We concur with his Honor that such delivery was not shown in the absence of any evidence that Colonel Moore was authorized to receive it, as her agent, from himself. If Mrs. Smith or the plaintiff claimed under the deed and the jury found the facts set out in the record to be true, and that Colonel Moore intended, by his act, to put the deed beyond his *legal* control, they would be justified in presuming that Mrs. Smith assented to the act as and for her benefit. In the aspect in which the question is presented here, no such presumption can be indulged. It was his duty to have had the lease registered—which act would have placed his intention beyond question—or to have delivered it to the parties interested. He was, in the view most favorable to the plaintiff's contention, the agent of Mrs. Smith, and his retention of the lease under his control, without registration, falls short of showing valid, lawful delivery. We do not find any error in his Honor's instructions regarding the weight to be given by the jury to the evidence concerning the case. The failure to have it registered was a circumstance which the jury could consider upon the issue of fraud.

The other assignments of error relate to his Honor's charge upon the question of fraud, in the light of the evidence tending to show that at, before and after, the execution of the deed, Colonel Moore was the general agent of Mrs. Smith. His Honor said to the jury: "When one is the general agent of another and has entire management of his affairs, so as in effect to be as much his guardian as the regularly appointed guardian of an infant, *a presumption of fraud, as a matter* *of law,* arises from a transaction between the agent and his principal for the latter's benefit, and it will be decisive of the issue in favor of the principal unless it is rebutted."

"That if the jury find from the evidence that Roger Moore was the general agent of the plaintiff and her mother in the management of this property, at the time he procured the deed to be executed, then the law presumes that the transaction was fraudulent; and unless the defendants have satisfied you, *from all their evidence,* by the greater weight of the evidence, that the transaction was open, fair and honest, it would be the duty of the jury to answer the issues 'Yes.'"

"If the jury find by the greater weight of the evidence that Roger Moore, at the time he procured the deed from the plaintiff and her mother, was the general agent of the plaintiff and her mother, in the management of their property and affairs, and that they relied upon him for his advice in their business transactions, and that this relationship existed at the time he procured the deed, then the law presumes that the deed was obtained fraudulently, and the burden would be on the defendants to show that Roger Moore obtained the deed fairly; and unless the defendants have satisfied you that the deed was obtained fairly by the greater weight of the evidence, it would be your duty to answer the issue 'Yes,' because, when such an agent deals with his principal in a transaction by which he is to be benefited, and the transaction is questioned by his principal, the fiduciary relationship being established, the law puts the burden on such agent to show there was no fraud; and if you find, by the greater weight of the evidence, that Roger Moore, at the time he procured the deed was such general agent, then the burden is on the defendants to satisfy you by the greater weight of the evidence that the deed was obtained fairly, and unless you are so satisfied, you should answer the issue 'Yes,' *even though you should be of the opinion that the plaintiff has not shown that any fraud was committed.*"

The learned counsel for defendants contend that these instructions are not in accord with the opinion in this cause on the former appeal. 142 N. C., 277. We have examined the careful and well considered language of Mr. Justice Walker in the case as reported in that appeal. It was our purpose, and we think that the language correctly expressed it, to adhere to the law as laid down by *Pearson, C. J.,* in *Lee v. Pearce,* 68 N. C., 76. In that case it is said: "After a full consideration of the authorities and 'the reason of the thing,' we are of the opinion that only 'the known and definite fiduciary relations' by which one person is put in the power of another, are sufficient under our present judiciary system, to raise a presumption of fraud, as a matter of law, to be laid down by the Judge as decisive of the issue, unless rebutted." Among "the known and definite fiduciary relations," the Chief Justice says that, "When one is the general agent of another and has entire management so as to be, in effect, as much his guardian as the regularly appointed guardian of an infant," the presumption applies. It is conceded that there is evidence tending to show that the relations existing between Colonel Moore and Mrs. Smith and plaintiff were within the language quoted. In *McRae v. Battle,* 69 N. C., 98, the doctrine of *Lee v. Pearce* was argued by learned and eminent counsel and adhered to, the Court, *Pearson, C. J.,* saying: "The relation raises a presumption of fraud which annuls the act unless such presumption is rebutted. The doctrine rests on the idea not that there *is* fraud, but that there *may be* fraud, and gives an artificial effect to the relation beyond its natural tendency to produce belief. The doctrine was adopted from motives of public policy to prevent fraud, as well as to redress it, *and to discourage all dealings between parties standing in these fiduciary relations.*"

Lee v. Pearce has been cited with approval in *Harris v. Carstarphen,* 69 N. C., 416; *Simmons v. Westmoreland,* 72 N. C., 587; *Edgerton v. Logan,* 81 N. C., 172, where the relation was attorney and client. *Smith, C. J.,* citing *Lee's Case,* italicizes the words, "presumption of fraud as a matter of law." *Wessell v. Rathjohn,* 89 N. C., 377, and many other cases. It is the controlling authority with us. We think that his Honor's instruction to the jury is in accord with the law and the decisions of this Court.

There was much evidence strongly tending to rebut the presumption, showing that the entire transaction originated in the mind of Mrs. Smith, and that both Colonel Moore and the attorney selected by her to draw the paper acted in perfect good faith. She writes Mr. Cutler on 2 March, 1885: "It is my first and greatest wish, should I outlive my only remaining child, that my house and lot on Red Cross and 2nd streets shall descend to my son-in-law, Roger Moore, and his children. His loving kindness and sympathy to me in all time of trouble has been unswerving, and in all times of need his hand, and his alone, has been stretched out for my help and comfort. He has buried my dead, paid my taxes and insurance for twenty years. . . . . Another strong claim in his favor is from his child, my grandchild, lately dead." So far as this record shows, no word had passed between Colonel Moore and Mrs. Smith in regard to her property at the time she wrote this letter. The gentleman to whom it was addressed was an attorney of the highest character and professional skill. There is ample evidence to sustain the statements made in the letter. It is not claimed that there was any secrecy in the manner, time or place of executing the deed. It was placed on record January 23, 1886. It is one of the tragedies so frequently occurring in human life that a transaction, originating in the most benevolent and kindliest motives, concludes in dissension and rupture of the ties of family and friendship. The evidence taken as a whole falls far short of showing that any fraud was committed or intentional wrong done by those who have passed away. That a mistake was made in interpreting Mrs. Smith's purpose, that a will was intended to be executed by her, and so understood by the plaintiff, and not a deed, as understood by her attorney and Colonel Moore, is not impossible or improbable; that the lease was prepared and signed securing to Mrs. Smith and the plaintiff the possession and enjoyment of the property is conceded. Unfortunately it was not registered and, as we have seen, its delivery not established. While we find no error in the conduct of the trial entitling the plaintiff to a new trial, we think that, in view of the fact that in neither appeal has it been necessary to set out the testimony, it is but just to the dead, whose conduct has come under investigation, to say that we think that the verdict of the jury (as in the second trial, 145 N. C., 269), was founded upon the presumption of law as to which they were correctly instructed by the Court. We have given to the entire record our most anxious and careful consideration. The testimony and contentions of the parties were fairly submitted to the jury. As we have endeavored to show, his Honor's rulings are in accord with the decisions of this Court. It may not be improper to say, in conclusion, that the wisdom of the law discouraging transactions between persons occupying fiduciary relations, whereby any advantage is gained by the one whose duty it is to protect the other, is illustrated in this case. It was, in the light of the defendant's contention, the manifest duty of Colonel Moore to have registered the lease for the protection of Mrs. Smith and the plaintiff. His failure to do so, however free from intentional wrong,.exposed the home and other property of these aged and infirm ladies to be sold at any time during his life, or since his death. The lease was invalid, until registered, against the deed as to purchasers for value and creditors. The law seeks to enforce the elementary truth that men should not have "a divided duty" or occupy antagonistic relations towards those who have entrusted to their care important interests. There is

No error.

LEE CONDOR et al. v. D. A. SECREST et al.

(Filed 19 November, 1908).

1. **Jurisdiction—Deeds and Conveyances—Mistake of Law—Courts of Equity.**

The courts of equity have jurisdiction to correct a deed to effectuate the intention of the parties, wherein it appears, from the construction of the entire instrument and from the action of the parties, that there has been a mistake of law.

2. **Deeds and Conveyances—Habendum—Remainder—Construction.**

While a stranger to a deed cannot be introduced in the habendum clause to take as a grantee, he can therein take in remainder by way of limitation, when, by construction of the entire instrument, it appears that the intention of the parties is given effect. An estate to D., "her heirs and assigns" in the premises; habendum, to hold, "to her," the said D., during her natural life, and at her death to the heirs of S. *Held*, the deed, construed in its entirety, conveyed only a life estate to D. with limitation over in accordance with the terms of the habendum clause.

3. **Deceased Persons, Transactions With—Title Claimed—Declarations.**

When deceased has had no interest in the lands in dispute, but was simply an assignee of a purchaser thereof and made a deed in accordance with directions given, evidence of his declarations and directions respecting the manner in which the deed was to have been drawn does not come within the prohibition of Revisal, sec. 1631, involving transactions and communications with deceased persons, as no claim of title is made under him.

4 **Deeds and Conveyances—Conveyances to Heirs of Living Person—Children.**

An estate granted to D. for life and then to the heirs of S., who was then alive, is operative as to the conveyance of the remainder under Revisal, sec. 1583, which construes the word "heirs" to mean children, in such instances.

5. **Principal and Agent — Independent Purpose — No Question of Agency.**

When a person is acting upon his own intention, and thereby effectuates a conveyance to D. for life and then to his own children, no question as to his acting as the agent of D. is presented.

ACTION tried before *Long, J.*, and a jury, August Term, 1908, of LENOIR.

The pleadings, evidence and verdict disclose the following case: J. E. Brown and John Hill, executors, sold the lands in controversy at public auction to J. L. Orr, who transferred his bid to L. M. Secrest, upon the understanding with said Secrest that title should be made by the executors to Nancy Doolin "for and during her natural life, then to the heirs of L. M. Secrest." Pursuant to said agreement, the deed was drawn and signed by the executors, with the words in the *premises* to said "Nancy Doolin, her heirs and assigns," and, in the *habendum*, "to hold the aforesaid premises to her, the said Nancy Doolin, during her natural life, and at her death to the heirs of L. M. Secrest." The deed, so executed, was delivered to Nancy Doolin, who took possession of the land and remained therein until she intermarried with said L. M. Secrest; they continued to reside thereon until the death of said Secrest, during the month of February, 1904. It was the purpose and intention of the parties to have the deed so drawn as to vest in Nancy Doolin a life estate, with the remainder to the heirs of L. M. Secrest, and the words imposing the limitation were placed in the habendum of the deed, by the mutual mistake of the draughtsman and the parties to the deed. The deed was not registered during the life of Secrest. The words limiting the estate to Nancy Doolin for life, remainder to the heirs of Secrest, were "clipped" from the deed, and thereafter it was presented for registration by his administrator in its mutilated condition. Thereafter, said Secrest and his wife, formerly Nancy Doolin, conveyed the land in fee to R. T. Brown, who executed a mortgage to secure the purchase money, no part of which has been paid. Plaintiffs are the grandchildren of L. M. Secrest, being the children of two deceased daughters. One of the grandchildren having assigned his interest to James Helms, he was permitted to become a party plaintiff. Nancy Secrest, formerly Doolin, having died pending the action, her administrator was made a party defendant. R. T. Brown made no defense to the action. The administrator of Nancy Secrest asked that the mortgage to her be foreclosed. Such of the foregoing facts as were not admitted, were found in response to a series of issues submitted to the jury. His Honor rendered judgment for the plaintiff, correcting the deed and directing such correction to be entered on the records, etc., as were necessary to vest the title in the plaintiffs. The deed to Brown and mortgage from him to secure the purchase money were directed to be cancelled. The defendants, having noted exceptions and assigned errors, which are noted in the opinion, appealed.

H. B. Adams, Jr., and *Williams & Lemmond* for plaintiff.
Redwine & Sikes for defendant.

CONNOR, J. The defendants lodged a number of exceptions, several of which presented the same question. Such as are not discussed in the brief are abandoned. The first exception is pointed to the submission, over defendant's objection, of the fifth issue, directed to the mistake in drawing the deed. Plaintiff's cause of action was twofold. First. That the deed, as written, contained the language limiting the estate of Nancy Doolin for life, remainder to the heirs of L. M. Secrest. That these words in the habendum had been "clipped" out and the deed registered after its mutilation. That, as registered, the deed conveyed to Nancy Doolin an absolute fee simple estate. Second. That the words of limitation were put in the habendum instead of the premises of the deed by the mutual mistake of the draughtsman and the parties. The relief which was essential, from the plaintiff's point of view, to make the deed conform to and effectuate the intention of the parties, required the Court to reinstate the words of limitation and, by way of correcting the mistake, to insert them in the premises. This is what his Honor did. To present the last contention, his Honor submitted the fifth issue: "Were the said words, 'to her, the said

Nancy Doolin, for and during her natural life, and at her death to the heirs of L. M. Secrest,' placed in the habendum clause instead of in the premises of the deed, and allowed to remain there after the execution and delivery by reason of a mutual mistake of the draughtsman and the parties to the deed, and by reason of the mutual mistake of the said draughtsman and the parties in supposing that the words so placed in the habendum of the deed would have the effect of conveying a life estate to the said Nancy Doolin, and the remainder to the heirs of L. M. Secrest?" And defendants assign his action, in this respect, as error.

We presume that plaintiffs tendered this issue because of the principle announced by this Court in *Blair v. Osborne*, 84 N. C., 417, and stated in 1 Jones on Conv., 564, that the *habendum* in a deed shall never introduce one who is a stranger to the premises, or cut down an estate in fee to a life estate; that the habendum may be used "to explain, enlarge or qualify the premises, but not be totally contrary or repugnant." If the plaintiffs are correct in assuming that, by reason of the placing of the words of limitation in the habendum instead of the premises, the deed, as written, conveyed the fee simple to Nancy Doolin, they were compelled to seek the aid of the Court for correction or reformation. The mistake made in drawing the deed was one of law and not of fact. We do not find any evidence tending to show that, as a matter of fact, the draughtsman intended to put the words in the premises and by mistake put them in the habendum. It is probable that the parties did not know that it was material in which part of the deed the words were inserted —none of them were lawyers. That a mistake of law under such circumstances will be corrected, so that the intention of the parties may be effectuated, is settled by decisions of this Court and, with well defined limitations, is a doctrine of equity. *Korneyay v. Everitt*, 99 N. C., 30; Bispham's Eq., sec. 186; 20 Am. & Eng. Enc., 824. The evidence is plenary that Secrest, who gave direction what estate he wished conveyed to Nancy Doolin, supposed that the deed, as drawn, effected such purpose. The language which he wished was inserted. It is equally clear that the draughtsman supposed that, as inserted, Secrest's intention was effectuated. It is found, as a fact, that Nancy Doolin accepted the deed and went into possession of the land under the impression that she had only a life estate. The fact that the words of limitation were afterwards "clipped" from the deed, manifests clearly that the parties who did it understood, that, as written, it conveyed only a life estate to Nancy with remainder to the heirs of Secrest. From that point of view there was a clear equity for reformation of the deed.

It is by no means clear, however, that any reformation was necessary—that the words of limitation, fraudulently "clipped," did not, as a matter of law, effectuate the intention of the parties. A careful examination of the opinion of *Judge Ashe* in *Osborne v. Blair, supra,* discloses that the Court, in that case, held that while a stranger to the premises could not be introduced in the habendum to take as *grantee* he could take in remainder by way of limitation. In that case the land was given to A. in the premises, and in the habendum to A. and her children by her then husband. A gift to "A. and her children" vests the present interest in them as tenants in common—therefore, if the gift be to A. in the premises, and "A. and her children" in the habendum, the children, if they take at all, take a present interest as tenants in common with their mother, and the principle which prohibits the introduction of a stranger, as grantee, of a present interest, applies—but the learned Justice says: "The deed should have such a construction as is most favorable to the minds and intention of the parties as the rules of law will permit." After saying what he gathered from the language of a deed to be the intention of the parties, he concludes: "If that was the intention, the form of the deed for that purpose comports with the rules of construction, for the doctrine is laid down in Shepherd's Touchstone, 151, that 'one who is not named in the premises may, nevertheless, take an estate in remainder by limitation in the *habendum,*' citing other authorities for the proposition, that 'while the habendum shall never introduce one who is a stranger to the premises to take as grantee, he may take by way of remainder.' " The deed in *Osborne's Case* was construed to give to A. an estate for life, remainder to her children. In our case the manifest purpose of the parties was to give Nancy Doolin an estate for life, remainder to the heirs of L. M. Secrest. *Osborne's Case* is, therefore, a direct authority for holding that, notwithstanding the placing of the words of limitation in the *habendum* instead of the premises, the limitation is valid, and the "minds and intent of the parties" is given effect. It is an elementary principle controlling the construction of deeds, as other contracts, that the intention of the parties will be gathered from the whole instrument and every word given effect. The only limitation placed upon this general principle is, that when the law has given to words a definite meaning, they will be so interpreted as to give effect to this legal signification. The Court, if necessary to ascertain the intention of the parties, will transpose sentences. In *Phillips v. Thompson,* [illegible] N. C., 543, the word "heirs" was in the warranty and not in the premises or habendum, hence, under the decisions, only a life estate was conveyed; the Court transposed, rearranged the placing of the word "heirs," and gave effect to them to convey the fee. The same was done in *Allen v. Bowen,* 74 N. C., 155. In *Staton v. Mullis,* 92 N. C., 623, *Smith, C. J.,* said: "The instrument expresses the intent to convey the inheritance, and that intent may be effectuated with equal, if not stronger, reasons by transposing and annexing to the conveying words, the concluding part of the sentence." Along the same line of thought, it is said: "The inclination of many Courts, at the present day, is to regard the whole instrument, without regard to formal divisions. The deed is so construed, if possible, as to give effect to all of its provisions and thus effectuate the intent of the parties." Jones on Conv., sec. 568. In *Faure v. Daley,* 63 Cal., 664, it is said: "If it appears from an inspection of the whole deed that the grantor intended by the habendum clause to restrict, limit or enlarge, the estate named in the enlarging clause, the habendum will prevail over the granting clause." *Edwards v. Beall,* 75 Ind., 401; *Beard v. Osborne,* 113 Mass., 318; *Bartholomew v. Muzzy,* 61 Conn., 387. It would seem that the fifth issue was unnecessary and immaterial --hence, in any point of view, non-prejudicial.

Defendants except to the admission of the testimony of J. E. Broom, one of the executors who made the deed, in regard to the declarations and directions of L. M. Secrest respecting the manner in which the deed was to be drawn. Secrest had no interest in the land, nor does the administrator of Nancy Doolin claim under him. We do not perceive how this testimony, in any aspect of the case, comes within the prohibition of section 1631, Revisal. The plaintiffs do not claim under Secrest—he never had any interest in the land, but, as the assignee of the bidder at the sale, directed how it shall be conveyed. The limitations to his "heirs" would be void under the familiar maxim, *nemo est haeres viventis,* but for the provisions of the statute, Rev., sec. 1583, which enacts that in such cases the word "heirs" shall be construed to mean children. *Starnes v. Hill,* 112 N. C., 1.

No question of agency is presented. Secrest was not acting as agent of Nancy Doolin—he was acting, so far as the record shows, for himself, and carrying out his own declared purpose to secure to her a home for her life and then to his children. It is true that Mr. Broom says that Secrest said "something about some of her money being in it." This is too indefinite to form the basis of any conclusion. We find no error in his Honor's instruction or refusal to give those submitted. We have examined the entire record with care and find no error. The jury, upon ample and competent testimony, under proper instructions from the Court, have found the facts as contended by plaintiffs. The only possible question, in regard to which any doubt could exist, was whether the evidence showed a mistake of fact in regard to the placing of the words of limitation. For the reasons we have pointed out, when the words in the habendum were restored, we are of the opinion that by giving effect to the intention of the parties, the children of Secrest were entitled to the land by way of remainder, upon the death of Nancy Dodin. His Honor has reached the same conclusion by a different route. The "clipping" of the words from the habendum of the deed and having it recorded in a mutilated condition was wrongful. The judgment restores the parties to their rights. There is

No error.

A. W. HAYWOOD et al. v. WACHOVIA LOAN AND TRUST COMPANY.

(Filed 19 November, 1908).

1. Courts—Equitable Jurisdiction—Wills, Interpretation of.

The courts of equity have jurisdiction in matters of the construction of wills involving the administration of trusts, and when devises and legacies are so blended and dependent on each other as to make it necessary, to construe the whole to determine the respective rights of the beneficiaries.

2. Wills, Interpretation of—Entire Instrument—Intention.

A will should be construed as a whole to ascertain the intention of the testator there disclosed; and a general rule of construction must yield whenever a different intention is manifested from the language of the will to that otherwise inferred.

3. **Same — Executors and Administrators — Trusts and Trustees — Guardian and Ward—Commissions—Power of Courts.**

A testator in his will bequeathed certain property to his infant daughter, and should she die leaving no child or children, then to his sister. Persons named were appointed executors and trustees "to carry out and perform the trusts therein declared." By a codicil to the will a guardian for the infant daughter was appointed, and the terms of the will ratified and confirmed in all other respects. *Held*, (1) The appointment of a guardian in the codicil was not inconsistent with the appointment of the trustees by the will to hold and control the property; (2) It is not necessary that title to the property be given in express terms, and the trustees, in this instance, are to take over, as trustees, the property from themselves, as executors, and hold and invest the same according to the terms of the will and for the period of time accordingly required; (3) It being conceded that the full income is for the infant daughter, it is to be paid to her guardian during her minority, and, thereafter, to her; (4) The guardian and executors should not receive full commission on account of monies disbursed between them, and the Court should make further and appropriate orders, after due notice, in relation thereto.

4. **Wills, Sale of Lands Under—Conversion—Personalty.**

The proceeds of the sale of land made under the direction of the will are as personalty, and so regarded, under the equitable doctrine of conversion, as of the time of the death of the testator.

ACTION for construction of a will, from ALAMANCE, heard by *Moore, J.*, by consent, at chambers, at Greensboro, 19 June, 1908.

This action, in the nature of a bill in equity, is brought by A. W. Haywood and B. S. Robertson, executors and trustees under the last will and testament of Charles T. Holt, deceased, against defendants Wachovia Loan & Trust Co., guardian of the estate of Louise M. Holt, an infant, and Mrs. Gena J. Owen, guardian of the person of said infant, and the other defendants who claim an interest, in remainder, in the property disposed of by the will of the said Charles T. Holt, deceased. The facts, in regard to which there is no substantial controversy, are: Charles T. Holt, lately domiciled in the county of Alamance, in this State, on 23 August, 1899, made and published his last will and testament, in which he gave to his mother, Mrs. Louise M. Holt, "for and during her natural life, the proceeds of a policy of insurance on his life, for the sum of ten thousand dollars, with the remainder after the life estate given my said mother to my daughter Louise M. Holt and her issue, and to my sisters, Cora M. Laird, Louise M. Haywood and Ella M. Wright, and their issue, in the estates and manner and subject to the limitations and conditions mentioned, stated and set out in item four of this my last will and testament. I do hereby direct my executors, hereinafter named, to collect said policy of insurance as soon after my death as possible and invest the proceeds thereof for the benefit of the parties in this item mentioned, paying to my said mother the net income thereof as long as she shall live." He gives to his wife the proceeds of certain insurance policies on his life, amounting to $81,000; also certain real estate and other personal property. He directs his executors to collect the insurance policies and pay the proceeds over to his wife. He expresses a wish that she shall, at her death, make certain disposition of the proceeds of said policies, but expressly says that his wish is not to be treated as obligatory. The fourth item of the will is in the following words:

"4th. I give, devise and bequeath to my daughter Louise M. Holt and her heirs, subject to the limitations and conditions in this item annexed and imposed, all the balance of my property and estate, real, personal and mixed, wheresoever the same may be or be situated, including all my stock in the Granite Mfg. Co., the Thomas M. Holt Mfg. Co., and the Cora Mfg. Co., and the remainder, after the life estate of my mother, Louise M. Holt, in the proceeds of Policy No. 582170 in the New York Life Insurance Co. of New York City, for ten thousand dollars; to her, the said Louise M. Holt, in fee simple, provided and subject to the limitation and condition that she shall have and leave alive at the time of her death, a child or children, or the issue of such child or children, should any such child or children of hers predecease her and leave issue alive at the time of her death; but should my said daughter, Louise M. Holt, die leaving no child or children, or the issue of such, alive at the time of her death, then, and in that case, I do hereby will, give, devise and bequeath all the property and estate in this my last will and testament given, devised and bequeathed to my said daughter, Louise M. Holt, to my sisters, Cora M. Laird, Louise M. Haywood and Ella M. Wright, absolutely and in fee simple, equally and share and share alike, alive at the time of the death of my said daughter, Louise M. Holt, and to the issue then alive, of such of my said sisters as may be dead at that time, the issue representing their parents, and taking such share as he or she would have taken if alive at that time, to them and their heirs absolutely and in fee simple. And I hereby direct my executors, hereinafter named, to pay all my just and honest debts and funeral expenses out of the dividends that may be earned and declared on my stock in the Granite Mfg. Co., the Thomas M. Holt Mfg. Co., and the Cora Mfg. Co., and I hereby charge said stock with the payment of said debts and funeral expenses, and no dividends from said stock shall be paid to any of the legatees under this my last will and testament, until and after said debts and funeral expenses shall have been paid in full."

"5th. I hereby nominate, constitute and appoint A. W. Haywood and B. S. Robertson, of Haw River, N. C., executors and trustees to carry out and perform the trusts therein declared, and I hereby revoke all former wills by me made."

On . .day of. . . .1900, said testator executed the following codicil to his will:

"Whereas by my said last will and testament, I did in item 2nd thereof give, devise and bequeath the proceeds of policy No. 582170 in the New York Life Insurance Co. of New

York City for ten thousand dollars to the parties and in the manner, upon the terms, conditions and estates in said item set out and mentioned; and whereas since the execution by me of said last will and testament, my mother, Louise M. Holt has died, and I desire to make other and different disposition of the proceeds of said Policy of Insurance, I hereby direct my executors to pay all my just and honest debts and funeral expenses out of the proceeds of the said policy of insurance. In case all of the proceeds of said policy of insurance are not necessary for the payment of said debts and expenses, I give, devise and bequeath any balance of said proceeds that may remain, after the payment of said debts and expenses, to the parties, save and except my said mother, Louise M. Holt, now dead, and in the estates and upon the same terms and conditions as are set out in my said last will and testament. And in case said proceeds of said policy of insurance are not sufficient to pay all my just and honest debts, then I hereby direct my executors to pay such portions of them as remain unpaid after applying said proceeds of said policy of insurance as above directed, in the manner and from the funds named, mentioned and set out in item 4th of my said last will and testament.

"And whereas in my said last will and testament, I have made no provision for the guardianship, custody and tuition of my infant daughter, Louise M. Holt, I do hereby, in case she shall be living at the time of my death and be under the age of twenty-one years, appoint and my will is that my wife Gena M. Holt, sometimes called Gena J. Holt, shall have the possession, custody and tuition of my said daughter, Louise M. Holt, for such time as she may remain under twenty-one years of age; and in case of her death during the minority of my said daughter, then and in that case, I will and appoint that my sister, Louise M. Haywood, sometimes called Daisy Haywood, shall have the custody and tuition of my said daughter during her minority. And I earnestly entreat their utmost care, respectively, in and about the morals and education of my said daughter, and desire that she may be brought up and instructed in the doctrines of religion.

"And it is my will and desire, and I hereby will and appoint and request, that the Wachovia Loan and Trust Co., of Winston, N. C., of which Mr. Frank Fries is now the President, be made and appointed by the proper legal authorities the guardian of the property and estate of my said daughter for such time as she may remain under twenty-one years of age.

"And in all other respects, I do hereby ratify and confirm my said last will and testament, of which this codicil is hereby declared to be a part."

The testator died on the .. day of December, 1900, the will and codicil were duly admitted to probate, and the plaintiffs duly qualified as executors thereto. Defendant Trust Company was, on the 20th day of December, 1902, duly appointed guardian of the estate of the infant defendant Louise M. Holt. The executors have paid the debts and made a final accounting and settlement of the estate of their testator, which has been audited by the Clerk of the Superior Court of Alamance County. They hold, subject to the provisions of the will and codicil thereto, 1230 shares of the common stock of the Holt Granite Manufacturing Company of the par value of $123,000.00, $1,400, full value, North Carolina 4 per cent. bonds, with coupons attached, $601.89 to their credit in bank. Since the death of the said Chas. T. Holt, his widow, Mrs. Gena J. Holt, has intermarried with defendant, Horace T. Owen, and with her infant daughter, defendant Louise M. Holt, resides at Trenton in the State of New Jersey. She is about the age of eight years. The amount invested in the North Carolina bonds is derived from the sale of the Linwood Plantation, pursuant to the terms of the will of the late Gov. Thomas M. Holt, father of the testator, and of certain "Trustee Notes," referred to in the pleadings. The shares of stock in the Holt Granite Manufacturing Company represent the stock owned by the testator at the time of his death, as set forth in the complaint. The plaintiffs allege:

That said A. W. Haywood and B. S. Robertson, executors as aforesaid, are ready and anxious to make a final settlement of the estate of their said testator, and to pay, deliver and turn over to the parties entitled thereto, all the assets belonging to the estate of their said testator as soon as they can safely do so, but owing to difficulty arising from the obscure and uncertain terms of some of the clauses of his last will and testament and codicil thereto, they desire for their protection to obtain the construction of the terms of said will and codicil by the Court, and directions from the Court as to their duties in the premises, and to that end they ask the Court a solution of the following questions arising upon the construction of said Chas. T. Holt's will and codicil as follows:

First. Is it the duty of said A. W. Haywood and B. S. Robertson as executors under said last will and testament and codicil thereto of Chas. T. Holt, to hold, invest and manage all the estate of said Chas. T. Holt now in their possession as aforesaid (except said North Carolina bonds bought with his share of the proceeds of sale of said "Linwood" Plantation), until the death of the said Louise M. Holt, paying the income therefrom during her life to her or to said Trust Company as her guardian until her arrival at the age of twenty-one years, and thereafter to said Louise, herself, until her death, and, at her death, to pay over and deliver the corpus thereof to the parties entitled thereto under the provisions of said Chas. T. Holt's will and codicil?

Second. Is it the duty of said A. W. Haywood and B. S. Robertson, under said last will and testament and the codicil thereto to Chas. T. Holt, to hold, invest and manage said North Carolina bonds bought with his share of the proceeds of sale of said "Linwood" Plantation until the death of said Louise M. Holt, paying the income therefrom during her life to her or to said Trust Company as her guardian until her arrival at the age of twenty-one years, and thereafter to said Louise, herself, until her death, and at her death to pay over and deliver the corpus thereof to the parties entitled thereto under the provision of said Chas. T. Holt's will and codicil?

The plaintiffs ask the instruction of the Court, whether it is their duty to turn over and deliver to themselves, as trustees, the property set out in the complaint. They also ask a construction of the will in regard to their duty when Louise M. Holt reaches the age of twenty-one years. His Honor held that the plaintiffs, A. W. Haywood and B. S. Robertson, are constituted trustees, by said will, and that as such trustees it is their duty to receive from themselves as executors, upon a final accounting and settlement of the estate of their testator, the property and estate given to Louise M. Holt, subject to the limitations set forth in the will; to invest and hold said estate and pay the income therefrom, less cost and expenses, to defendant Wachovia Loan and Trust Company until her arrival at the full age of twenty-one years, and thereafter to the said Louise M. Holt and, upon her death, to deliver the corpus of the estate to the parties then entitled under the terms of the will of said Chas. T. Holt and the codicil thereto. His Honor further held that any accumulation of income, in the hands of the guardian, be paid over to said Louise M. Holt upon her arrival at full age. From the judgment rendered the defendant, Wachovia Loan and Trust Company, guardian, and Horace T. Owen, guardian *ad litem* of the said Louise M. Holt, appealed.

Ernest Haywood for plaintiffs.

Shepherd & Shepherd for defendant appellee.

Manly & Hendren and *Parker & Parker* for defendant appellants.

CONNOR, J., after stating the case: The jurisdiction of the Superior Court to entertain and decide this action is derived from the jurisdiction vested in the Court of Equity, as it was constituted in this State, prior to the Constitution of 1868, by which the Court of Equity, as distinct branches of our judicial system, was abolished, and the jurisdiction vested in them conferred upon the Superior Court. The jurisdiction of the Court of Equity grew out of its general control over trusts and trustees. In *Tayloe v. Bond,* 45 N. C., 5, *Pearson, J.,* says: "The jurisdiction, in matters of construction (of wills) is limited to such as are necessary for the present action of the Court, and upon which it may enter a decree, or direction in the nature of a decree . . . . A Court of Equity can only take jurisdiction when trusts are involved, or when devises and legacies are so blended and dependent on each other as to make it necessary to continue the whole, in order to ascertain the legacies; in which case the Court having a jurisdiction, in regard to the legacies, takes jurisdiction over all matters necessary for its exercise."

We do not entertain any doubt, nor is it denied, that the estate given by the testator to his infant daughter, Louise M. Holt, is subject to the limitations imposed upon it; that she takes the property in fee, if that term may be used as descriptive of an estate or interest in personalty, subject to the "limitation and condition that she shall have and leave alive at the time of her death, a child or children, or the issue of such." Upon failure of such child or children or the issue of a child or children living at her death, the property is given to the defendants, who are the sisters of the testator, absolutely, etc. It is not necessary, to enable the executors to discharge the trust reposed in them, for us to decide whether, by implication, the property is limited to such child or children or the issue thereof, who may be living at the death of Louise M. Holt, or whether she takes the absolute interest, subject to be divested by her death without a child or children, or the issue of such, living at her death. This question may never arise and, if it does, it is by no means certain that the present defendants will be interested in its settlement. That the limitation is valid and that the sisters of Chas. T. Holt are interested in the preservation of the corpus of the property, to meet the contingency of Louise M. Holt dying without issue or the issue of such living at her death, is clear; that the testator recognized and provided for this contingency by the appointment of trustees to hold the corpus of the property, is manifest from the language of the will.

It is, of course, of vital interest to the trustees and the Wachovia Loan and Trust Company to know what duties are imposed upon them and what rights are vested in them in respect to the control of the property. Whether, in view of the size of the estate, the age of the child and the probable income expected from the property, the case falls within that class of cases decided by this Court, wherein the executors are required to hold the property and pay over the income to the first beneficiary, is doubtful. The property is given as the residue of the estate, after payment of debts. *Smith v. Barham,* 17 N. C., 420; *Ritch v. Morris,* 78 N. C., 377, represent one class, while *Tayloe v. Bond, supra; Britt v. Smith,* 86 N. C., 305, fall in the other class wherein it is held that the first taker is entitled to the possession of the property. While the Courts endeavor to follow the general rule announced in these cases, in construing wills, yet, as said by *Ruffin, J.,* in *Britt v. Smith, supra:* "At most, the rule is one of construction, designed to give effect to the intention of the testator, and will yield whenever he manifests a different one or when it cannot be applied without defeating what seems to be his purpose; and it is therefore the duty of the Court, in every such case, to look at the whole will to ascertain, if possible, the intention there disclosed." We had occasion to examine the question and review the decided cases at this term. Knowles Estate, 148 N. C., ... It is an elementary and universal principle that, in the construction of a will, the Courts will, if possible, effectuate every provision contained in it and not nullify any provision unless manifestly repugnant to some other one, in which event they will give effect to the last provision.

With this principle as our guide, we seek to ascertain the intention of the testator with regard to the persons who should control the property given to his infant child, to meet the contingencies created by him. He was a man of intelligence, evidently well advised as to the condition of his estate and of his family. His will was evidently made in view of the probability that he would not long survive its execution. He knew that the income from his estate would exceed the amount necessary for the support and education of his child. He had made ample provision for his wife. He must have known that, pursuant to the limitations placed upon the estate given his daughter, it would be necessary to provide some means for giving effect to them by retaining, in the hands of some one, the corpus of the estate; that when she arrived at twenty-one years of age the guardianship of her person and her estate would cease, and that the guardian would have no power to retain the property. In view of these conditions he provided, in effect, that, after the settlement of his estate, payment of his debts, etc., A. W. Haywood and B. S. Robertson should be "trustees to carry out and perform the trusts therein declared." He appoints them "executors and trustees." To give both terms effect, we must find an intention on his part to provide for the settlement of his estate in the usual way by his executors, and the preservation of the property to meet the "limitations and conditions" by placing it in the hands of trustees.

In the codicil he expresses a desire that the Wachovia Loan and Trust Company be appointed guardian. This is not inconsistent with the appointment of trustees to hold and control the property. The office and duty of the guardian is distinct from that of a trustee. The guardian receives the income, disburses it for the support and education of the infant until she attains full age, when his office and duty comes to an end, the trustee thereafter paying the income directly to Louise M. Holt. Thus construed, every provision and clause of the will is effectuated. This intention we gather from the entire will and codicil. The latter is not repugnant to the former. On the contrary, the testator, after disposing of the legacy given his mother, who had died since the execution of the will, and making some other provisions, expressly "ratifies and confirms" the will.

The fact that the estate is not given to the trustees, and the "limitations and conditions" imposed, declared in the form of specific trusts, does not affect the question. "When it is essential to the carrying into effect the provisions of a will, a trust, by implication of law, will be decreed. Though no trust is created by the will, the Court will have regard to the intention as gathered from the entire document." Beach on Trusts, sec. 88. While it is true that to constitute a valid declaration of trust, it must appear from the language used that such was the intention of the testator, and that the terms, subject matter, beneficiaries, etc., must be so reasonably certain as to be capable of enforcement, it is equally true that specific language, declaratory of a trust, is not necessary, provided the intention is clear and the other requisites are found. It is not necessary that the title be given in express terms to the trustees. If the trust is otherwise manifested and a trustee named, he will, by implication, take such title and estate as is necessary to enable him to execute the trust. *Smith v. Proctor,* 139 N. C., 314. In *Payne v. Sale,* 22 N. C., 455, it is held, in accordance with the authorities, both in England and this country, that, in the construction of wills, the estate given to a trustee is to continue for so long a period as is necessary to enable him to execute the trust. Looking to the entire will and the codicil, we have no doubt that it was the purpose and intention of the testator to create a trust and that, upon the settlement of his estate by Mr. Haywood and Mr. Robertson, as executors, they should, as trustees, at once hold and invest the corpus of the residue given to his daughter to preserve for her use and benefit, during her life, and at her death to pay over and deliver to those who may be entitled, under the "limitations and conditions" imposed upon the estate. We should be inclined to the same opinion if he had not named trustees, but any doubt of his intention is removed by the fact that he has named plaintiffs as trustees, "to perform and carry out the trusts therein declared." We see no difficulty in carrying out his intention. The plaintiffs, as executors, will turn over to themselves, as trustees, the estate in their hands, keep the same invested and pay over the income during her minority, to the Wachovia Loan and Trust Company, guardian, and, when she shall arrive at full age, pay over such income to her during the remainder of her life and, at her death, deliver the property to such person or persons as may be entitled under the terms and provisions of the will. It is conceded that the "limitations and conditions" applied to the estate do not apply to the excess of the income, that being given absolutely to Louise M. Holt.

The Court has the power and, upon application may, in this action, provide for a fair division of the commissions on the income between the trustees and the guardian. Both should not receive full commissions. It is also within the power of the Court to make such other and further orders as may, upon due notice, be found necessary to meet such conditions as may arise.

No difference in respect to the rights of the legatees of Chas. T. Holt, or the duty of the trustees, exists between the proceeds of the insurance policies and stocks, or other personalty, and the proceeds of the "Linwood Plantation." The direction contained in the will of Governor Holt to his executors to sell the land, operated as an equitable conversion, so that the beneficiaries, including Chas. T. Holt, took the proceeds as personalty. Although the sale was not made until after his death, his interest passed as money to his executors. The conversion took place at the death of Governor Holt. *Benbow v. Moore,* 114 N. C., 263.

The judgment of his Honor, as indicated in this opinion, must be

Affirmed.

L. J. C. PICKLER and C. W. STEWART v. COUNTY BOARD OF EDUCATION.

(Filed 19 November, 1908).

1. **Municipal Corporations—School Boards—Discretion—School Districts.**

In the absence of misconduct, or of violation of some provision of statute, the action of a school board in dividing townships into school districts and in the erection and maintenance of school buildings, cannot be supervised or restrained by the courts. Revisal, secs. 4116, 4121, 4124.

2. **Municipal Corporations—School Districts—Discretion—Rebuilding School-house—Proximity to Another School.**

When a school board, acting according to its judgment, without misconduct on its part, or in violation of some provision of statute, rebuilds a school-house on an old site, though in less than three miles of some school already established, it is not a violation of Revisal, 4129, providing that no new school shall be established within that distance of another.

3. **Injunction—Appeal—Abstract Question.**

When pending an appeal from a judgment dissolving a restraining order the act sought to be restrained is accomplished, the Court will dismiss the appeal.

ACTION from DAVIE, heard by *Long, J.,* 18 June, 1908, at Statesville, upon return to restraining order, issued by *Moore, J.* Plaintiffs appealed.

Burton Craige and *Jacob Stewart* for plaintiffs.
E. L. Gaither and *T. B. Bailey* for defendants.

CLARK, C. J. Rev., sec. 4129, provides that the County Board of Education, upon whom is placed the duty of dividing the townships into school districts, "shall establish no new school in any township within less than three miles, by the nearest traveled route, of some school already established in said township."

The public school district of "Cherry Hill," Davie County, was laid off, site bought and building erected 50 or 60 years ago. It is now nearer than three miles to another public school. The building needing repairs, an effort was made to induce the defendant Board to remove the site and build a new school house at another point a mile away. After hearing those in favor of and those opposed to the removal, the Board decided not to change the site, and instead of repairing, to build a new school building on the old site. The plaintiffs obtained a temporary restraining order which, on affidavits filed, and, after hearing, was dissolved by Judge Long.

There was no error. The duty of dividing the townships into school districts and the erection and maintenance of school buildings is left to the judgment of the School Board. Rev., secs. 4116, 4121, 4124. There being no allegation of misconduct, their action can not be supervised nor restrained by the courts unless in violation of some provision of the statutes. *Smith v. School Trustees,* 141 N. C., 160. It does not appear whether the other school house, "nearer than three miles," was erected before, or since, this was erected at Cherry Hill 50 or 60 years ago. But, at any rate, the prohibition that the Board "shall establish *no new school* in any township within less than three miles, by the nearest traveled route, of some school already established in said township," cannot be construed to prohibit the Board from repairing, or building a new school house, on the site where a school has long been established.

Pending the appeal the new school house has doubtless been built. If that appeared, we would not decide an abstract question. In any event the judgment dissolving the restraining order should be

Affirmed.

MARY JANE SPRINKLE v. MATTIE V. SPAINHOUR et al.

(Filed 19 November, 1908).

1. **Deeds and Conveyances—Husband and Wife—Heirs of Wife—Second Wife's Dower.**

When land has been conveyed to husband and wife, omitting the word heirs after the names of the grantees, then to the wife by name, and heirs, the wife of a second marriage cannot claim dower after the death of the husband in the lands so conveyed, as only a life estate passed to the husband and the fee to the first wife, which, without testamentary disposition, would pass to heirs.

2. **Deeds and Conveyances—Husband and Wife—Heirs of Wife—Estate Conveyed.**

A deed to a husband and wife, and only to the heirs of the latter, does not pass the fee to the former by virtue of Revisal, sec. 946, for as to him it is plainly intended that the grantor meant to convey an estate of less dignity.

3. **Deeds and Conveyances—Husband and Wife—Wife's Estate—Right of Survivorship.**

When deeds are mutually given among the heirs at law to effect a partition of lands descended to them, and one of them is to a married woman whose husband is jointly named therein, but not jointly entitled, the doctrine of the rights of survivorship does not apply; and it matters not if the deed was made at the wife's request, because she is presumed to have acted under his coercion.

4. **Partition of Lands—Owelty Paid by Husband—No Resulting Trust.**

Owelty money paid by a husband to equalize the partition of lands descended to his wife, among other heirs at law, as tenant in common, does not create a resulting trust in his favor to that extent, for, nothing else appearing, the law presumes he intended it for a benefit or as a gift.

ACTION heard before *Councill, J.*, jury trial being waived by consent, September Term, 1908, of Forsyth, upon petition for dower, commenced before the Clerk, and transferred to term of court.

The Court upon the facts admitted gave judgment against the plaintiff, who appealed. The facts are stated in the opinion of the Court.

Benbow & Hall for plaintiff.
Watson, Buxton & Watson for defendant.

BROWN, J. The plaintiff claims dower as the widow of J. H. Sprinkle, having been his second wife. The defendants claim the land as the heirs at law of S. E. V. Sprinkle, the first wife of J. H. Sprinkle.

The land in controversy was the property of Washington Payne, and descended to his heirs at law, S. E. V. Sprinkle, P. W. Payne and others. These heirs at law, on the same day, 12 January, 1887, executed deeds to each other. These deeds were evidently executed to effect a voluntary partition of the land, and while inartificially drawn, they were not intended to change the character of the estate of the heirs of Washington Payne in the lands inherited from him. *Harrison v. Ray,* 108 N. C., 215. It was evidently not the purpose of the parties to divest the fee simple of S. E. V. Sprinkle and vest it in her husband.

The plaintiff claims dower in the land described in the deed to J. H. and S. E. V. Sprinkle upon the theory that it is a deed made to husband and wife after marriage; that they became tenants by entireties, and that upon the death of the wife the entire fee vested in the husband by survivorship.

There would be more plausibility in the position if the estate conveyed to the husband and wife were the same. But the language of the deed, both in the premise and in the habendum, conveys the land "to J. H. Sprinkle and wife S. E. V. Sprinkle, and S. E. V. Sprinkle's heirs."

These words effectuated the plain intention of the parties, that if the husband survived the wife he should enjoy the land for his life and afterwards it should go to her heirs. That is the disposition the law would have made of it had the deed never been made and the wife had died intestate before the husband, having had children by him born alive. It is not an unprecedented method of conveying land that, in the same instrument, a joint estate should be created in two and the fee invested in one only. It was recognized at common law. "If lands be given to two, and to the heirs of one of them, this is a good jointure, and the one hath a freehold and the other a fee simple, and if he which hath the fee dieth, he which hath the freehold shall have the entirety by survivor for term of his life." Coke on Littleton, sec. 285 and 191; Butler's note 78; 2 Cruise, 510, 511; 1 Washburn on Real Property, 648 and cases cited; *Den v. Hardenburg,* 18 Am. Dec., 371.

But it is contended that J. H. Sprinkle took a fee, as much so as his wife under this deed, although the word "heirs" is omitted as to him, and that this is by virtue of the act of 1879, Revisal, sec. 946. This statute does not help the plaintiff, for the statute does not create a fee without the word "heirs," where "it shall be plainly intended by the conveyance or some part thereof that the grantor meant to convey an estate of less dignity." That intention, so far as J. H. Sprinkle is concerned, is too plain to be doubted.

There is another insuperable obstacle in the way of the plaintiff's claim for dower:

Assuming for the sake of the argument that this particular deed, under the circumstances attending it, had conveyed an estate in fee to husband and wife, both, the husband and those claiming as his heirs would not be permitted to set up a claim to the land.

It descended to S. E. V. Sprinkle from her ancestor, and this partition deed was made during her coverture. At the date of its execution the land belonged to her separate estate. It is one of the essentials of the peculiar estate by entireties sometimes enjoyed by husband and wife, that the spouses be *jointly entitled* as well as jointly named in the deed. Hence if the wife alone be entitled to a conveyance, and it is made to her and her husband jointly, the latter will not be allowed to retain the whole by survivorship. And it matters not if the conveyance is so made at her request, because being a married woman she is presumed to have acted under the coercion of her husband. *Moore v. Moore,* 12 B. Mon., 664; *Babbitt v. Scroggins,* 1 Duval, 273; *Gillan v. Dixon,* 65 Pa. St., 395, all cited in 18 Am. Dec., pp. 383, 384.

The same principle is recognized by this Court in *Harrington v. Rawls,* 136 N. C., 65; *Carson v. Carson,* 122 N. C., 645.

The fact that J. H. Sprinkle paid some of the owelty money for his wife to equalize the partition, would not create a resulting trust in his favor to that extent, because the law presumes he intended it as a benefit or gift to his wife, nothing else appearing.

Upon a review of the record we think the judgment of the Superior Court is correct.

Affirmed.

PETER COTTON v. NORTH CAROLINA R. R. CO.

(Filed 25 November, 1908).

1. **Nonsuit—Evidence, How Construed.**

Upon a motion as of nonsuit upon the evidence, the evidence must be construed in its most favorable light to the plaintiff.

2. **Master and Servant—Safe Appliances—Negligence—Damages.**

In an action for damages for injuries received, alleged to have been the result of improper instruments given by the employer to the employee with which the latter was to do the work entrusted to him, the liability of the former, in damages, depends upon whether he was negligent in respect to the instrumentalities provided.

3. **Same—Proof Required.**

For the recovery of damages for injury alleged to have been caused to an employee by reason of the negligently furnishing by the employer improper implement with which he was to perform his work within the scope of his employment, the former, to establish his case, must show: (1) That the implement furnished by the master was, at the time of the injury, defective; (2) That the master knew of the defect, or was negligent in not discovering it and making needed repairs; (3) That the defect was the proximate cause of the injury. (In this case, the question as to the duty of the servant to inform the master of the defect did not arise upon the evidence).

4. **Master and Servant—Safe Appliances—Knowledge of Defect—Inspection—Negligence.**

The employer must not only use ordinary care and diligence to provide safe and suitable implements for the employee to do the work required of him, but he must exercise a reasonable supervision over them and ordinary care in keeping them in safe condition. When an employee is injured by a defective truck on which he was required to carry trunks to a train at defendant's station, and there is evidence that a pin keeping a wheel on had been worn by constant use so that it gave way, resulting in the injury complained of, the question for the jury to say whether, by a careful inspection, the defendant should have discovered the defective condition.

ACTION tried before *Moore, J.*, and a jury, February Term, 1908, of GUILFORD.

This action was brought to recover damages for injuries alleged to have been caused by the defendant's negligence. The plaintiff who, on 13 May, 1906, was in the employ of the defendant, was ordered by George W. Vernon, the baggage agent at Greensboro, N. C., to carry some trunks from the north bound train No. 34, which had just arrived, to the east bound train No. 112. Vernon told him to make haste, as the east bound train was about to leave. Plaintiff and Will Suggs started with the truck, which weighed one thousand pounds, and was loaded with trunks. He was pulling with his back towards the trunks and Suggs was pushing the truck. In going from one train to the other they had to pass around another truck. Will Suggs testified: "When we went around (the other truck), he was guiding the truck and I was pushing; it was heavily loaded. When he turned around he ran the off wheel of the truck over the rail and, as he turned, the wheel came off and the truck caught his foot — that is the way it happened. The wheel that fell off the truck had crossed the iron track—the right wheel; it was going right straight across it and did not run in any groove. It was right level there. It was night, but the lights were around there. I said a minute ago that, in running around the other truck, the wheel went on the outside of the rail; there is no flange to the wheel. The rail is higher than the inside of the track, but is about level with the floor. In between the floor in the center of the track and the rail there is a groove, so that, in coming around from the inside, the wheel would have to pass over that groove and against the rail. The wheel went straight across the track; did not run down the track." The plaintiff testified that the wheel fell off the spindle when the truck struck the southbound track. George W. Vernon, a witness for the defendant, testified: "I made an examination of the wheel right then and there. The platform is so built up there that the outside is up level and smooth with the top of the rail; on the inside is a space of about three inches. The spindle had fallen on the platform a few inches from the rail and the wheel had fallen on the spindle. I took the wheel off the spindle and examined it. The pin was in the spindle, but had been bent outwards. Both ends of the pin were bent down flat to the spindle and the wheel had drawn off over the pin; the wheel coming over both the pin and the spindle. The pin was not broken; it was simply bent. The pin was a little worn; the truck had been used some time. There was no wear of the spindle or pin that would injure the use of the truck that I could observe. I found the spindle lying down near the groove in the track, and the wheel over the spindle, and the pin and spindle in the condition I have described. I didn't see the wheel when it came off. I could not tell how long the pin had been in use, but it was somewhat worn. I could not tell how long the truck had been in use, but it had been used for some time. It would be impossible for me to tell, as we were always getting new trucks. I could not tell the length of time it had been in use; could not say whether it had been in use three years; might have been and it might have been less. Could not tell whether we had trucks that had been in use four or five years." There was evidence tending to show that the plaintiff was struck by the iron bar of the truck and, also, by one of the trunks which fell from the truck. At the close of the evidence, the defendant moved to nonsuit the plaintiff. The motion having been refused, the defendant excepted. There was a verdict for the plaintiff and, judgment having been entered thereon, the defendant appealed.

John A. Barringer for plaintiff.
Wilson & Ferguson for defendant.

WALKER, J., after stating the case: Where a motion to dismiss an action is made, under the statute, the evidence must be construed in the view most favorable to the plaintiff, and every fact which it tends to prove, and which is an essential ingredient of the cause of action, must be taken as established, as the jury, if the case had been submitted to them, might have found those facts from the testimony. *Brittain v. Westhall,* 135 N. C., 492. Applying this rule, we think there was evidence in the case proper for the consideration of the jury upon the question of negligence. The duty of the employer to his employee is thus stated in *Marks v. Cotton Mills,* 135 N. C., 290: "The employer does not guarantee the safety of his employee. He is not bound to furnish him an absolutely safe place to work in, but is required simply to use reasonable care and prudence in providing such a place. He is not bound to furnish the best known machinery, implements and appliances, but only such as are reasonably fit and safe and as are in general use. He meets the requirements of the law if, in the selection of machinery and appliances, he uses that degree of care which a man of ordinary prudence would use, having regard to his own safety, if he were supplying them for his own personal use. It is culpable negligence which makes the employer liable, not a mere error of judgment. We believe this is substantially the rule which has been recognized as the correct one and recommended for our guide in all such cases. It measures accurately the duty of the employer and fixes the limit of his responsibility to his employee," citing *Harley v. B. C. M. Co.,* 142 N. Y., 31. So that the liability of the employer to the employee in damages for any injury the latter may receive, while engaged in his work, depends upon whether the employer has been negligent. *Avery v. Lumber Co.,* 146 N. C., 592; *Berkley v. Waste Co.,* 147 N. C., 585. In respect to instrumentalities provided by the master for the use of the servant, the latter, in order to establish his case, must show: 1. That the implement furnished by the master was, at the time of the injury, defective. 2. That the master knew of the defect or was negligent in not discovering it and making the needed repairs. 3. That the defect was the proximate cause of the injury. *Hudson v. R. R.,* 104 N. C., 491; *Shaw v. Manufacturing*

Co., 143 N. C., 131; *R. R. v. Barrett,* 166 U. S., 617. We may omit any reference to the duty of the servant to inform the master of any defect found by him, as there is no evidence in this case that fixes the plaintiff with any knowledge of the alleged defect in the truck, either in law or in fact. There is another duty the master owes to his servant and that is to inspect, at reasonable intervals of time, the implements he furnishes for use by his servant. I Labatt M. & S., sec. 154 and 157; Bailey's Pers. Inj., sec. 2638; *Leak v. R. R.*, 124 N. C., 455. At what intervals this inspection should be made, will depend upon the kind of implement used and the special facts and circumstances of the case. The defendant alleges in the answer that the pin was not in the spindle and for that reason the wheel fell off and, further, that the plaintiff should have known that the pin was missing; but there is no evidence to sustain this allegation. The defendant's own witness testified that the pin was "somewhat worn," and that "both ends of the pin were bent down flat on the spindle and the wheel had drawn off over the pin."

We cannot say, as a matter of law, that the pin had not been weakened by being worn and was strong enough to hold the wheel in its place on the spindle. The truck was being moved in the ordinary and usual way, so far as appears, and in the proper place. As it gave way, under the circumstances, and was worn by constant use, the jury might well have inferred, as they did, that it was either originally defective and insufficient or had become so by being "somewhat worn." It was for the jury to say whether, by a careful inspection, the defendant could have discovered its defective condition. We must assume, in the absence of the charge of the Court, that they were properly instructed as to this feature of the case. In *Car Co. v. Parker,* 100 Ind., 181, the Court holds: It is the duty of the master to use ordinary care and diligence to provide safe and suitable machinery for use by the servant whom he employs to work upon it. The master's duty does not end with providing safe and suitable machinery, but he is also bound to exercise a reasonable supervision over it, and to exercise ordinary care in keeping it in safe condition for use by his servants, and this duty he cannot rid himself of by casting it upon an agent. It is only ordinary care that must be exercised by the master, such care as the peculiar conditions and circumstances would suggest to a man of ordinary prudence, but this requires that he should take notice of the liability of an implement he places in the hands of his servant to become worn and unsafe from age and use. See also *Parsons v. R. R.*, 94 Mo., 286; *Hackett v. Manufacturing Co.*, 101 Mass., 101; *R. R. v. Holt*, 29 Kansas, 149, and Bailey's Pers. Inj., sec. 2634-2638, where the subject is fully discussed. In *Hackett v. Manufacturing Co., supra,* it was held that whether an employer was negligent in not ascertaining that a chain which operated an elevator had been worn and become thinner and therefore unsafe, by reason of which the elevator fell and injured the plaintiff, was a proper question for the jury. The same authorities also sustain the proposition that the plaintiff, when he was ordered by Vernon to use the truck, had the right to assume that it was in a safe condition.

Our conclusion is that the Court properly submitted the case to the jury upon the evidence.

No error.

JOHN F. DAVIS & SON v. L. A. THORNBURG et al.

(Filed 25 November, 1908).

1. **Negligence — Traction Engine — Highways — Nuisance—Reasonable Time—Questions for Jury.**

   In a suit for damages occasioned by plaintiff's horse being frightened by a broken down traction engine left to one side of a public highway, it is for the jury to say, upon the question of negligence, whether the defendant delayed an unreasonable length of time in having it repaired and in taking it away.

2. **Appeal and Error—Exceptions—Evidence Rejected—Harmless Error.**

   When the damages sought are those arising from a fright received by plaintiff's horse caused by a traction engine left by defendant to one side of a public highway, it is harmless error for the trial Judge to exclude evidence tending to show the gentle nature of the horse, when uncontradicted evidence to the same effect was subseqeuntly admitted.

ACTION tried before *Moore, J.,* and a jury, February Term, 1908, of GASTON.

The Court submitted these issues:

(1). Were the plaintiff's horse, buggy and harness injured by the negligence of the defendants, as alleged in the complaint? Answer: No.

(2). Did plaintiff's agent, by his own negligence, contribute to the injury of said horse, buggy and harness, as alleged in the answer? Answer: ——.

(3). What damages, if any, are plaintiffs entitled to recover? Answer: ——.

From the judgment rendered the plaintiffs appealed.

O. F. Mason and *A. G. Mangum* for plaintiffs.

Defendants not represented in this court.

BROWN, J. The horse of plaintiff, driven by his son, took fright at a traction engine of defendants, and backed off a bridge with buggy attached, and was injured. The evidence tends to prove that the engine had broken down near the foot of the bridge, and was left on the side of the public road from Saturday at 5 P. M. until the following Tuesday morning. It is contended by the plaintiffs that the engine was left on the public highway an unreasonable length of time, and that it thereby became an obstruction and nuisance.

There is no evidence whatever in the record that the engine so obstructed the road as to prevent the passage of vehicles, although it may have been such an object as tended to frighten some horses. So would a broken down coach, top wagon, or the like. A traction engine, operated and guided by the owner or his agent, may as lawfully traverse the public highway as plaintiff's horse and buggy. Revisal 1905, sec. 2727. It is not a nuisance *per se,* but a highly useful instrumentality among modern labor-saving machines. If it breaks down on the highway it becomes the duty of the owner to remove it, but he is allowed a reasonable time within which to do so. What would be a reasonable time depends upon circumstances and is not, under the evidence and circumstances of this case, exclusively a question of law. *Claus v. Lee,* 140 N. C., 552.

As the engine broke down Saturday afternoon at a late hour and Sunday intervened, the defendants used only one work day in getting it repaired. This delay would not appear *prima facie* to be unreasonable. His Honor left the matter very properly to the jury, who found for the plaintiff.

The exception to the ruling of the Court refusing to allow plaintiff to prove that his animal was a reasonably gentle animal cannot be sustained. Such question was undeniably proper, but we think the plaintiff received the full benefit of such evidence in the subsequent uncontradicted testimony which proves that his mare was an animal of gentle qualities.

We think there is no merit in the exceptions to evidence, and that the learned Judge put the case to the jury in a charge full, fair and free from error.

No error.

GEORGE S. POWELL v. JULIAN A. WOOD.

(Filed 25 November, 1908).

1. **Wills—Trusts and Trustees—Deeds and Conveyances—Descriptive Words—Estate.**

   A devise to N. of all the residue of testator's estate in trust to receive, hold, invest and reinvest, evidences the purpose of the testator to embrace therein both real and personal property. (*Foil v. Newsome*, 138 N. C., 115, cited and approved).

2. **Wills—Estate—Property Passed.**

   Unless the contrary intent appears, the disposition by the testator in his will of the residue of his estate, will pass both real and personal property.

3. **Wills—Intention—Presumption—All property.**

   The presumption is, that a testator intended by his will to dispose of all his property, and not to die intestate as to any part of it.

4. **Wills — Executor and Administrator — Trusts and Trustees — Deeds and Conveyances—Power to Convey Implied.**

   When a power is given a trustee under a will to receive, hold and invest and reinvest, the estate of his testator, including lands, which is consistent with the other terms of the will, it confers the authority to sell the lands and make valid title thereto.

ACTION heard by *Ward, J.*, October Term, 1908, of BUNCOMBE.

This action was heard in the Superior Court, upon the following case agreed:

1. On 13 September, 1902, Sarah S. Newton, wife of George H. Newton, being the owner in fee and in possession of a tract of land in the city of Asheville, executed her will which, on 31 October, 1903, after the death of the said Sarah S. Newton, was duly probated and recorded, as prescribed by law.

2. The said Sarah S. Newton, at the time of her death, left surviving her George H. Newton, her husband, and one child, Neinon Newton, who was, at that time, and still is, a minor.

The provisions of the will, material to this controversy, are as follows:

"I hereby give, devise and bequeath all the rest, residue and remainder of my estate of whatsoever name and description and wheresoever situated to my husband, George H. Newton, in trust to receive, hold and invest and re-invest the same in such securities as he may deem mete and proper for the best interest of my estate, and to take, receive and appropriate to his own use and benefit the entire income and profit therefrom until my daughter, Neinon Newton, shall attain the age of twenty-one years. When my daughter shall attain the age of twenty-one years, he shall pay to her the entire profit and income from said estate until she shall attain the age of thirty-five years, and when she shall attain the said latter age to pay over and deliver to her the entire principal of said estate, and the trust hereby created shall thereupon cease and determine. Should my said daughter Neinon die before attaining the age of thirty-five years, then upon her death the principal of my estate shall pass to and vest in my said husband, George H. Newton, and his heirs forever."

The said George H. Newton has duly qualified as executor of the last will of Sarah S. Newton.

4. On 16 October, 1905, George H. Newton, individually and as trustee, appointed in said will, duly executed and acknowledged a deed of conveyance sufficient in form and words to convey to George S. Powell, in fee simple, the said lot or parcel of land, which said deed was thereafter duly recorded.

5. In the year 1906, J. C. Martin, of Buncombe County, North Carolina, duly qualified as the guardian of Neinon Newton, and as such guardian instituted a special proceeding in the Superior Court for the purpose of selling and conveying, as prescribed by statute, all of the right, title and interest of Neinon Newton in said lot of land to George S. Powell, in order that the interest of the said minor in said land might

be converted into money and transferred to her domicile; said proceeding was regular in all respects, and a judgment was therein duly entered by the Clerk of the Superior Court and approved by the Judge of the Superior Court, directing the guardian to convey by a proper deed, the interest, right and title of Neinon Newton in and to said lot of land to George S. Powell for the consideration agreed upon between the parties thereto, and thereafter, the guardian duly executed and delivered to George S. Powell a deed of conveyance, sufficient in form and words, to convey to him all of the right, title and interest of Neinon Newton in and to said tract or parcel of land; the total consideration paid by George S. Powell for the land was $1,500.

6. In the month of August, 1908, George S. Powell, claiming to be the owner of said lot of land, and by virtue of said deeds of conveyance, agreed to sell and convey the land to the defendant, J. A. Woodcock, in fee simple, and the defendant J. A. Woodcock agreed to purchase the said land at the price of $2,000 in cash, and George S. Powell is ready, willing and able, and has offered, to execute and deliver a proper deed of conveyance for the land purporting to convey the same to said Woodcock, in fee simple, upon the payment of the amount agreed to be paid by Woodcock, but the said Woodcock has refused to accept the deed and has refused to pay the purchase money, or any part thereof, upon the ground that the said deeds executed to George S. Powell are not sufficient, in law, to pass to Powell a complete and perfect title to said land, and that Powell is, therefore, not able to make him a good title in fee simple to said property.

7. If the Court is of the opinion that the will and the said several deeds to George S. Powell are sufficient in form and substance to pass to him all of the right, title and interest which Sarah S. Newton owned in said lot of land, then judgment shall be entered herein in favor of the plaintiff, and against the defendant, for the sum of $2,000, and for specific

performance of the contract of sale in accordance with the course and practice of the Court; otherwise, judgment is to be entered for the defendant.

The Court, upon the facts admitted by the parties, decided in favor of the plaintiff and entered judgment accordingly. The defendant appealed.

Julian C. Martin for plaintiff.
Merrick & Barnard for defendant.

Walker, J. There are two questions presented in this case. 1. Does the word "estate," used in the residuary clause of Mrs. Newton's will, include her land? 2. Is the power to sell the land given to George H. Newton by implication? The identical questions, we think, are fully discussed and affirmatively answered in *Foil v. Newsome,* 138 N. C., 115, which is substantially like this case in its facts. "The word 'estate,' taken in its primary sense as used in a will, without anything in the context to limit it, is a word of very extensive meaning. It is nearly synonymous with the word 'property,' where that word is not qualified by the addition of the word 'personal.' Under the word 'estate,' used in its primary sense, real property of every description will ordinarily pass, and the presumption is that the testator, in using the word, uses it in its broad and inclusive signification, unless the context restricts its meaning to some particular species of property." I Underhill on Wills, sec. 295; *Foil v. Newsome, supra.* The presumption is that the testatrix intended by her will to dispose of all of her property, and not that she intended to die intestate as to any part of it. *Glasscock v. Gray,* 148 N. C.; *Harper v. Harper,* at this term. In the case last cited, we held that the word "estate" included the testator's land and was not restricted to his personal property. The language used in the will, which was construed in that case, did not indicate as clearly that such was the intention of the testator as does the language of the will now under consideration. In the will of Mrs. Newton, the words are, "all the rest, residue and remainder of my estate, of whatsoever name and description and wheresoever situated, to my husband, George H. Newton, in trust to receive, hold, invest and re-invest." This language is very broad and comprehensive and, by itself, and certainly when considered with what follows in the will, evinces unmistakably the purpose of the testatrix to dispose of both real and personal property. Gardner on Wills, pp. 399-411.

The other question is also free from difficulty. No technical language need be used in the creation of a power. Any words definite enough to disclose its nature, the donee, or the person by whom it is to be exercised, and its objects, are sufficient; and so with a power of sale, it may be created by express words or by implication of law. 18 Cyc., 320. It has, therefore, been held that "where a testator, in the disposition of his estate, imposes on his executor trusts to be executed or duties to be performed which require for their execution or performance an estate in his lands or a power of sale, the executor will take by implication such an estate or power as will enable him to execute the trusts or perform the duties devolved upon him." *Lindley v. O'Reilly*, 50 N. J., 636. Chief Justice Shaw stated the rule in these words: "If a testator having a right to dispose of his real estate, directs that should be done by his executor which necessarily implies that the estate is first to be sold, a power is given by this implication to the executor to make such sale and execute the requisite deed of conveyance." *Going v. Emery*, 16 Pick., 107. In *Foil v. Newsome, supra,* this Court said: "We are also of the opinion that the trustee has, by implication, the power to sell the land for the purpose of converting it into an income producing property. The usual rule adopted by the Courts is to find in language imposing upon an executor or trustee the duty of disposing of a mixed fund or property, an implied power to sell real estate to the end that he may discharge such duty. This construction reconciles the use of the words 'invest,' 'pay over interest or income,'" citing *Vaughn v. Farmer,* 90 N. C., 607; *Crawford v. Wearn,* 115 N. C., 540; *Council v. Averett,* 95 N. C., 131. The cases of *Foil v. Newsome, supra,* and *Cook v. Cook,* 47 Atl. Rep. (N.J. Ch.), 732, are direct authorities for such a construction of the will as devolves upon the trustee the duty, and therefore the power, to sell the lot, the title to which is in controversy. It all results in this, that the deed from George S. Powell to Julian A. Woodcock will convey a good and perfect title to the latter, under the facts admitted in the case agreed. *Carlton v. Goebler,* 94 Texas, 93.

It is not necessary to decide the other question raised, as to the nature of the estate acquired by Neinon Newton under the will, that is, whether it is a vested or contingent one, nor need we consider whether the deed from Newton to Powell will estop the former. Our decision upon the other matter disposes of the case.

Affirmed.

M. HANSTEIN v. T. M. FERRALL et al.

(Filed 25 November, 1908).

1. **Deeds and Conveyances—Parol Evidence—Locating Calls—Questions for Jury.**

   The description in a deed conveying a town lot as follows: "beginning at a stake on W. street, said town, 27 feet 6 inches from N. W. corner of C. T. B. lot, on the same street, and runs N. 41, W. about 25½ feet to Sycamore street; thence with Sycamore street S. 48, W. 117½ feet; thence S. 41, E. about 25½ feet, etc., is adequate and sufficient, and where, in connection with such deed, there is testimony to the effect "that plaintiff had built his present brick store along Sycamore street and fronting Wall street, and the wall of such store above the ground was seven inches into Sycamore street, and this infringement on Sycamore street had been satisfactorily adjusted with the town authorities," this evidence furnished data from which the second corner called for in plaintiff's deed, to-wit: the intersection between Wall and Sycamore streets, could be given a physical placing, to-wit: at a point seven inches short of the wall of the brick store, and required that the question of the correct location of plaintiff's deed should be submitted to the jury.

2. **Deeds and Conveyances — Boundaries — Recognition — Acquiescence.**

Recognition of and acquiescence in a line by the owners and occupants of adjoining lots as the true boundary line, is evidence of the true boundary line in cases when the correct divisional line is not otherwise clearly defined and established.

3. **Same—Nonsuit.**

While recognition of and acquiescence in a division line may not, as a rule, justify a departure from the true dividing line, when otherwise clearly established; when it is not so established, and plaintiff claims that defendant has built beyond it upon his land, evidence on the question of boundary is sufficient to go to the jury which tends to show, that upon each of the adjoining lots of plaintiff and defendant there had formerly been two wooden stores, subsequently destroyed by fire, so close together that their eaves had the same drip, causing the same trench on the ground by waters falling from them, that, to ascertain the correct dividing line, plaintiff had measured the distance between the brick pillars along the middle of the line caused by the common drip, and that the brick building then constructed by him without objection from defendant's grantor, had its walls on his own land twelve inches back from the line as ascertained; and in such case an order of nonsuit for want of any evidence of location was erroneous.

ACTION tried before *Neal, J.*, and a jury, February Term, 1908, of SAMPSON, to recover lands claimed to have been wrongfully appropriated by defendant to his own use in building beyond the dividing line of adjoining property of the parties.

At the close of plaintiff's testimony, on motion duly entered, there was judgment as of nonsuit under the Hinsdale Act, and the plaintiff excepted and appealed.

F. R. Cooper and *Faison & Wright* for plaintiff.
George E. Butler for defendants.

Hoke, J. As we understand, the nonsuit was ordered, because, in the opinion of the lower Court, the evidence offered as to the location of plaintiff's deed was not sufficient to justify or permit the submission of that question to the jury. The answers of the defendants admit that the plaintiff owned the lot covered by the deed, which is set out in the complaint, and contains in part the following description:

"A certain lot or parcel of land in the town of Clinton, Sampson County, N. C., described as follows: Beginning at a stake on Wall street, in said town, 27 feet and 6 inches from the N. W. corner of the C. T. Butler lot, on the same street, and runs N. 41 W. about 25½ feet to Sycamore street; thence with Sycamore street S. 48 W. 117½ feet; thence S. 41 E. about 25½ feet, etc., the same being the corner lot at the intersection of Wall and Sycamore streets."

And the plaintiff, a witness in his own behalf, testified as to his present brick store built along Sycamore and fronting on Wall street, among other things, "that the wall of his brick store, now on the lot above the ground, was 7 inches into Sycamore street; and this infringement on Sycamore street had been satisfactorily adjusted with the authorities of the town." This evidence of itself would require that the question of location should be passed upon by the jury, for it furnished data from which the second corner called for in plaintiff's deed, the intersection of Wall and Sycamore streets, could be given a physical placing, to-wit, at a point 7 inches short of the wall of plaintiff's brick store; for, while the more correct way to locate plaintiff's deed would be to establish the beginning corner "at a point on Wall street 27½ feet from the N. W. corner of the C. T. Butler lot," and then run according to the course and calls of the deed, in the absence of evidence offered or available as to the placing of this beginning corner, under the description as expressed in the deed, the location could proceed from this second corner if its placing was fixed and determined, the description to be run from this point according to the course and calls of the deed, *Lindsay v. Austin,* 139 N. C., 463; *Duncan v. Hall,* 117 N. C., 443, unless a greater certainty of identification could be obtained by reversing the first call and ascertaining the beginning corner in that way, which method is sometimes allowable. *Norwood v. Crawford,* 114 N. C., 513; *Dobson v. Finley,* 53 N. C., 495.

In the present case the result would seem to be the same, whether the one method or the other were adopted, but in either case the testimony, if believed by the jury, afforded data from which the location of plaintiff's deed could have been legally determined. Again, the evidence tended to show that the lots occupied and claimed by plaintiff and defendants adjoined each other, and both were formerly owned by T. M. Lee, deceased; that said Lee had constructed two wooden store buildings on these lots, and his heirs had conveyed one of these and the corner lot to one J. H. Stevens, who had later conveyed to plaintiff, and the other the heirs had sold to defendant, and the same was held under a bond for title pursuant to the contract of sale; that these store buildings, built so close together that their eaves had the same drip, and the water falling caused one and the same trench on the ground between them, were destroyed by fire, and the plaintiff in preparing to rebuild his present brick store, and, in order to ascertain the correct dividing line between the lots, had measured the distance between the brick pillars of the two stores, which remained standing after the fire, and staked a line midway of this distance and along the middle of the trench caused by the common drip from the eaves of the two stores. That plaintiff had started the foundation of his present store below the ground four inches back from the line indicated, and above the ground had drawn the wall eight inches further back, making the outside of plaintiff's wall above the ground twelve inches back from the line ascertained and marked in the manner above stated.

We are of opinion that this is proper evidence to be submitted to the jury on the question of location, tending, as it does, to show, on the part of the owners and occupants of these lots, recognition of this adopted line and acquiescence in it as the true divisional line between them. The doctrine by which this testimony is held to be relevant to the inquiry is thus stated in 5 Cyc., p. 940: "Recognition of, and acquiescence in a line as the true boundary line of one's land, not induced by mistake, and contained through a considerable period of time, affords strong, if not conclusive, evidence that the line so recognized is the true line."

And, while such recognition and acquiescence may not, as a rule, justify a departure from the true dividing line when otherwise clearly defined and established, the authorities cited fully justify this statement of the doctrine as applied to the facts presented on this appeal. *Davidson v. McD. Arledge,* 97 N. C., 172; *M. E. Society v. Akers et al,* 167 Mass., 560.

There was error in the order dismissing the action, and the cause will be restored to the docket for trial according to the course and practice of the Court.

Reversed.

CORA REEVES, by next friend, v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 25 November, 1908).

1. **Carriers of Passengers—Pleadings—Principal and Agent—Scope of Authority—Ticket Agents—Demurrer.**

   A motion to dismiss upon the complaint should be denied, when it is alleged that plaintiff, through her agent, bought of defendant railroad company's agent at its station, S., a ticket from K. to S. under contract that the plaintiff at K. was to be notified at once thereof by defendant's agents, which was not done within six days, through the defendant's carelessness and negligence, whereby plaintiff, who had no money with her, was unduly delayed, to her great damage.

2. Same—Evidence—Questions for Jury.

Evidence is sufficient to go to the jury upon the authority of defendant's agent at S., a station on its road, to receive money for the purchase of a ticket from K., another station thereon, to S., to be delivered to plaintiff by the agent at K. which shows a receipt for the payment of the ticket at S., stating that it was from K. to S.; a telegram from the agent at S. to the one at K., directing that the ticket, as contended for, be furnished plaintiff; the agent at K. informed plaintiff that he could not furnish it until he had been so advised; the actual furnishing of the ticket as contended for, thereafter, on a regular form used by the defendant for such service.

3. Issues—Negligence—Wilful Negligence—Harmless Error.

An issue as to wilful negligence is not prejudicial to defendant which goes only to the quantum of damages, when there was evidence of defendant's negligence, and the amount of damages was agreed upon in the event the jury found the affirmative of the question of negligence.

ACTION, tried before *Long, J.*, and a jury, July Term, 1908, of LEE, for damages for breach of contract of transportation, alleged to have been made on behalf of the plaintiff, Cora Reeves, with the defendant.

The Court submitted these issues:

1. Did the defendant agree to furnish the plaintiff transportation, as alleged in the complaint? Answer: Yes.

2. Did the defendant wilfully and negligently fail and refuse to furnish said transportation, as alleged in the complaint? Answer: Yes.

3. What amount, if any, is plaintiff entitled to recover of the defendant? Answer: $200.

From the judgment rendered the defendant appealed.

Seawell & McIver for plaintiff.

Jno. D. Shaw, U. L. Spence and *Murray Allen* for defendant.

BROWN, J. 1. The defendant moved the Court to dismiss the action because the plaintiff fails to state a cause of action. We see no ground upon which to found such contention.

Briefly stated, the cause of action, clearly set forth, is that the plaintiff, through her agent, John Houston, purchased transportation from Kittrell, N. C., to Sanford, N. C., over defendant's line, that the fare was paid to the agent at Sanford, who contracted to notify agent at Kittrell to deliver ticket from that station to Sanford to plaintiff, and that the agent at Sanford carelessly and negligently, for the space of six days, failed to notify the agent at Kittrell, whereby plaintiff, who had no money with her, was unduly delayed to her great damage.

We think his Honor properly overruled the motion.

2. Upon the first consideration of the case, we were of opinion that there was no evidence in the record tending to prove that the defendant's agent at Sanford had authority from the company to receive money for the purchase of a ticket from Kittrell to Sanford, to be delivered to plaintiff by the agent at the former place.

Upon more careful examination we are of opinion that there is evidence from which such authority may properly be inferred.

The witness Houston testifies that he was sending plaintiff to school at Kittrell, that when the session was over on 1 June, 1906, he "went to the Seaboard ticket office at Sanford and bought a ticket from the agent of the defendant from Kittrell to Sanford," that the ticket was to be delivered to Cora Reeves at Kittrell next day by the agent there, and that the agent at Sanford agreed to notify the Kittrell agent immediately.

Houston further testified that he at once wrote plaintiff to call for the ticket. The evidence proves that she did call for it and could not get it, and was delayed several days before the agent at Sanford notified the agent at Kittrell. The agent at Sanford gave to Houston the following receipt:

"Received of John Houston $2.25 for one first-class ticket to be furnished Cora Reeves, Kittrell, N. C., to Sanford, N. C."

After several days' unexplained delay the agent at Sanford sent the following telegram to the Kittrell agent:

"Sanford, 6-5: Agent: Please furnish Cora Reeves one first-class ticket to Sanford, advising for P. P. O. E. Penny, Agent S. A. L."

Terrell, the agent at Kittrell, testifies that plaintiff called for the ticket, but "I had no authority to issue it until I got the order above referred to."

We think, from the above evidence, that it may be reasonably inferred that, under the rules and regulations of the company, the agent at Sanford was authorized to receive at that office the price of a ticket from Kittrell to Sanford, and that it was his duty to notify the agent at Kittrell, without delay, to the end that he may deliver it to plaintiff.

The language of the witness Terrell, agent at Kittrell, is to the effect that, upon receipt of the telegram, he did have authority to issue the ticket, and the only reasonable construction to be placed upon his testimony is that he derived such authority from the regulations of the company.

The form of the telegram would indicate that such transactions were not foreign to the business of the defendant, and that its business regulations provide for such "prepaid orders."

3. The defendant excepted to the action of the Court in submitting to the jury an issue as to "wilful negligence," and contends that there is no evidence of wilful negligence.

There is abundant evidence of negligence upon the part of the agent at Sanford, not only from the plaintiff but from the defendant. In any view of the evidence, the agent at Sanford, upon his own testimony, as well as upon all the other evidence, was guilty of negligence in the discharge of his duty to the plaintiff, and such negligence was actionable. This being so, in consequence of the statement contained in the record, the question as to whether there is any evidence of wilful negligence would be material only upon the issue as to damages.

In reference to the damages, the record states that there was no contest as to the ruling, if the facts were found as shown, about the amount, "provided the Court had not erred in refusing defendant's motion to nonsuit."

We have held, upon the facts as shown by defendant's own evidence, the Court did not err in refusing the motion to nonsuit, as a case of actionable negligence was clearly made out. Therefore, the damages fixed upon by consent remain undisturbed, as the contingency upon which the Court would be authorized by the agreement to review that issue has not arisen.

Evidently, the sum agreed upon was more satisfactory to the defendant, in the event the motion to nonsuit could not be sustained, than the trouble and expense of another trial.

Upon a review of the entire record we find

No error.

GEORGE P. GRIMES v. JOHN H. BRYAN.

(Filed 25 November, 1908).

1. **Deeds and Conveyances—Description—Parol Evidence.**

A deed conveying a tract of land under the description: "A certain tract or parcel of land lying and being in the county aforesaid, fronting the farm of C. W. Taylor, adjoining the farm of T. H. Robinson, and others, and known as the B. H. Taylor place, being 150 acres more or less," is sufficiently definite to permit the reception of parol testimony to fit the description to the property, and it was further competent to show by such testimony that the father of defendant, and grantee in the deed, had constituted thirty additional acres, being the *locus in quo*, as a part of the B. H. Taylor place for the purposes of the deed, and that the same was included within the descriptive terms of the instrument.

2. **Deeds and Conveyances—Adverse Possession—Title—Instructions.**

When plaintiff claims the land by adverse possession, and the defendant claims as grantee of a purchaser at a sale under a mortgage given by plaintiff, which claim plaintiff resists upon the ground that the description in the mortgage does not cover the *locus in quo*, it is not to plaintiff's prejudice for the trial Judge to charge, in effect, that, if the plaintiff was in possession of the land for twenty years and held it openly and adversely within known and visible lines and boundaries, and had never conveyed the same, it would ripen the title in him.

ACTION, tried before *Lyon, J.*, and a jury, March Term, 1908, of EDGECOMBE, to recover thirty acres of land.

Plaintiff offered evidence tending to show title to the land in controversy by reason of adverse occupation by himself and his father, Thomas Grimes. Defendant offered in evidence a deed from said Thomas Grimes to plaintiff, dated 1 March, 1877, and claimed the land by virtue of foreclosure proceedings, under a mortgage executed by plaintiff to Claudia Redmond, conveyance under and by virtue of said mortgage from Claudia Redmond to J. F. Shackelford, 9 November, 1896, and deed from said Shackelford to defendant, dated 14 November, 1901.

In the deed from Thomas Grimes, the father of plaintiff, the land conveyed is described as follows:

"A certain tract or parcel of land lying, and being, in the county aforesaid, fronting the farm of C. W. Taylor, adjoining the farm of T. H. Robinson and others, and known as the B. H. Taylor place, being 150 acres more or less."

In the mortgage and deeds subsequent thereto, conveying the property included therein to plaintiff, the interest conveyed is described as: "a certain piece or parcel of land lying, and being, in said county and State, the same being the land which was conveyed to said George P. Grimes, plaintiff, by Thomas Grimes, by deed, dated 1 March, 1877, to which reference is made for particular description thereof."

There was evidence on the part of defendant tending to show that the description set out in the deed from Thomas Grimes to plaintiff covered the thirty acres in controversy, and further, that, while the place known as the B. H. Taylor place had originally, when same was conveyed to Thomas Grimes in 1867, contained only 118½ acres, said Thomas Grimes, with a view of making a fair and equal division of his land among his children, had annexed the thirty acres in controversy to the Taylor place and made the same a part thereof, and had included said thirty acres within the descriptive terms of the deed to his son, and as a part of the "B. H. Taylor place" as used in said deed.

There was evidence on the part of plaintiff, that the thirty acres in controversy was a separate piece of land, that it had never become a part of the land known as the B. H. Taylor place, and was not included within the deed to plaintiff from his father, nor within the mortgage to Claudia Redmond.

On issues submitted there was verdict for the defendant, and plaintiff excepted and appealed.

F. C. Harding and *Julius Brown* for plaintiff.
G. M. T. Fountain for defendant.

HOKE, J., after stating the case: We have given the record and the exceptions noted careful consideration, and find no error presented to plaintiff's prejudice. The description contained in the deed from Thomas Grimes to the plaintiff was sufficiently definite to permit the reception of parol evidence to fit the description to the property. *Hinton v. Moore,* 139 N. C., 44; *Perry v. Scott,* 109 N. C., 374; *Euliss v. McAdams,* 108 N. C., 507. And it was further competent to show by parol testimony, that the father of plaintiff and grantor in the deed had constituted the thirty acres in controversy as a part of the B. H. Taylor place for the purpose of the deed, and that the said thirty acres was included within the descriptive terms of the instrument. *Woods v. Woods,* 55 N. C., 420; *Rodgers and wife v. Buckhorne,* 58 N. C., 301; *Bradshaw v. Ellis,* 22 N. C., 20; *Dodson v. Green,* 15 N. C., 488.

In the charge of his Honor the rights of the parties were properly made to rest, chiefly, on whether the land in controversy was included in the deed from Thomas Grimes to plaintiff, and the subsequent deeds passing the interest to plaintiff under and by virtue of the foreclosure proceedings. This being true, and the defense having been made to rest chiefly on the assumption that plaintiff was at one time the owner of the land and had sold it to defendant, and those under whom defendant claimed, many of the exceptions noted become irrelevant, as they were made to adverse rulings of the Court, in the effort on the part of plaintiff to show title in himself. We think every right or claim available on the evidence to plaintiff was fairly submitted under the portion of his Honor's charge given in response to prayers for instructions on the part of plaintiff, as follows:

"That if you find from the evidence that the plaintiff went into the possession of the land described in the complaint and held the same in open, notorious and adverse possession under known and visible lines and boundaries for twenty years, and he has not conveyed it, it would give the plaintiff title, and you should answer the first issue 'Yes.'

"That if you find from the evidence that the plaintiff went into the possession of the land described in the complaint by a parol gift from his father, and held the same in open and adverse possession under known and visible boundaries for twenty years, and he has not conveyed it, it would give the plaintiff title, and you should answer the first issue 'Yes.'

"That if you find that the plaintiff's father gave the land described in complaint to the plaintiff, orally, and that he went in possession of same and held it for twenty years, cultivating and using it as his own, then it would give the plaintiff title, and he would be entitled to recover the same, unless he has made a deed of conveyance of the same."

We are of opinion that there is no reversible error in the record, and the judgment for defendant is affirmed.

No error.

RHEINSTEIN DRY GOODS CO. v. BETTIE McDOUGALL et al.

(Filed 25 November, 1908).

1. **Partnership—Credit Given—Statement of Partnership—Credit Agency—Notice of Error.**

   When a person notifies a credit agency that information previously given to it, that he was a member of a certain firm, was erroneous, he is not responsible to those of its patrons selling to the firm, relying upon the information that he was a member, after a reasonable time given the agency to notify them of the error.

2. **Partnership—Principal and Agent—Notice to Produce Letters—Attorney and Client.**

   Defendant informed a credit agency in reply to its request, by letter, that he was a member of a certain firm. The agency, by its general methods, informed its patrons, and one of them advanced credit to the firm upon the faith of the defendants being a partner. Thereafter, defendant notified the agency by letter, of which no copy was made, that his former letter was erroneous and that he was not one of the firm. The patron of the agency sued defendant to recover for goods sold and delivered. Notice to produce the second letter was given in ample time, before trial, to the attorney of plaintiff and to a local branch of the agency. *Held*, (1) Parol evidence of the contents of the letter was admissible upon failure of plaintiffs to produce letter; (2) The credit agency was the agent of the principal, and notice to the principal's attorney was sufficient; (3) The reply to notice to the local branch that all correspondence had been sent to an office of the credit agency beyond the State, was insufficient.

ACTION tried before *Long, J.*, and a jury, April Term, 1907, of NEW HANOVER. Defendants appealed.

K. McClammy and *M. L. John* for defendant.
Plaintiff not represented in this court.

CLARK, C. J. The appellant is the same defendant (Monroe), and the question is in regard to liability incurred by him for the same firm as in *Drewry v. McDougall,* 145 N. C., 286. In October, 1902, Monroe wrote a letter to R. G. Dun & Co., in reply to their inquiry, in which he stated that he, with others named, was a member of the firm of B. & S. McDougall. R. G. Dun & Co. gave that information to the plaintiff company, one of their patrons, who sold goods to said B. &. S. McDougall from 5 January to 27 March, 1903. The defendant Monroe sought to show that he notified R. G. Dun & Co., prior to the time plaintiff sold these goods, that the letter of October, 1902, was erroneous and that he (Monroe) was not a member of the McDougall firm.

Monroe could not foresee who would sell to the firm, and if he gave R. G. Dun & Co. notice in reasonable time, to correct its former information to plaintiff before it sold its goods to the McDougalls, Monroe did all he could do, and would not be liable, except for such goods as plaintiff might have sold the firm prior to the expiration of such reasonable time during which R. G. Dun & Co. should have notified plaintiff. This is what is held in *Drewry v. McDougall,* 145 N. C., 286.

The defendant Monroe kept no copy of his alleged letter of correction sent to R. G. Dun & Co., and, to let in parol evidence of its contents, he served notice upon the counsel of plaintiff and also upon the agency of R. G. Dun & Co., at Wilmington, N. C. An official of the latter answered the subpoena, and testified that the Wilmington office could not produce the letter, because, in 1902, all correspondence of R. G. Dun & Co. from the section in which the defendants lived was sent to the Richmond office. The counsel of plaintiff averred himself unable to produce the letter, because he was not counsel for R. G. Dun & Co., and had no knowledge of the matter. The Court declined to permit the defendant to give oral testimony as to the contents of the letter.

R. G. Dun & Co. were not parties to this action. They were agents of the plaintiff who furnished it information of Monroe's letter of October, 1892, on which it sold goods to the McDougalls, relying, it asserts, upon Monroe being a partner. If, before plaintiff sold this bill of goods, Monroe corrected his statement to R. G. Dun & Co., it was their duty to notify the plaintiff in reasonable time. This is not the case of one who is a partner and who therefore on withdrawal must bring that fact home to those who have dealt with the firm. Here Monroe having stated he was a partner, when he was not, corrected the error through the same source by which it had been transmitted to the plaintiff. It was competent for Monroe to put in evidence a copy of the letter if he had kept one. As he did not, it was competent for him to prove orally its contents, provided he served notice on the opposite party in sufficient time before the trial (as he did here) to produce the original letter to the defendant's agent.

The latter is competent because written to plaintiff's agent. Its proof by oral evidence is admissible only if the opposite party has reasonable notice in time to produce the letter and fails to do so. Such notice was properly served on the counsel of plaintiff and, it having failed to produce the letter, it was error to exclude oral evidence of its contents.

The notice need not be served, and, in fact, could not be served, on the non-resident agency of R. G. Dun & Co., who are not parties to this action.

Error.

CITY OF KINSTON v. S. H. LOFTIN, Guardian of Fred I. Sutton, et al.

(Filed 25 November, 1908).

1. **Municipal Corporations — Streets — Assessments, Validity of — Statutory Requirements.**

An assessment for a street improvement according to frontage as directed by the statute is valid.

2. **Same—Due Process—Constitutional Law.**

A statute authorizing such an assessment which provides for a notice that will enable the property owner to appear before some authorized tribunal and contest the validity and fairness of the assessment before it becomes a fixed charge on his property is not open to the objection that it deprives the owner of his property without due process of law.

3. **Same—Notice—Remedies.**

The action of a municipality to enforce the collection of a special assessment against the property of a citizen, when in strict accordance with the provisions of a statute authorizing it, is not invalid or unconstitutional on the ground that previous notice of the assessment was not given, when the statute gives the citizen the right to set up every available defense in the action pending.

ACTION, tried before *Neal, J.*, March Term, 1908, of LENOIR, to enforce collection of special assessment against property of defendants, jury trial having been formally waived by the parties.

There was judgment for plaintiff for the amount of the assessment claimed, and defendants excepted and appealed, noting their exceptions as follows:

"The defendants excepted to the judgment rendered for the reason that, under the evidence and the facts found, it should have been rendered in favor of the defendants and against the plaintiff, as no notice was given to the defendants of the assessment against the said land until after the assessment was made, and the defendants having been given no opportunity to appear before the board of aldermen before the assessment was made, the said assessment was the taking of property without due process of law, in violation of the Constitution of the United States."

Y. T. Ormond for plaintiff.
Wooten & Clark for defendants.

HOKE, J., after stating the case: The right to make assessments of this character, and the reasons upon which it may be properly made to rest, are fully and forcibly stated in the opinion delivered by Shepherd, J., for the Court, in the case of *Raleigh v. Peace*, 110 N. C., 32; and the method of assessment per front feet, being the one directed and pursued in this instance, has been also sanctioned with us by express decision. *Hilliard v. City of Asheville*, 118 N. C., 845. And the correct doctrine, with reference to notice required in these proceedings, is against the position contended for by defendants. On this question it is well established that, if notice is provided for "which will enable the property owner to appear before some duly authorized officer, board, or tribunal, and contest the validity and fairness of the assessment made against him, before it can become a fixed and established charge upon his property, it will be sufficient." 25 A. & E. (2 Ed.), 1216, citing *Gilmore v. Hunting*, 33 Kansas, 156. And our own decisions recognize and uphold this as substantially correct. *Lumber Co. v. Smith*, 146 N. C., 199.

In this case, the statute in question, Private Laws 1905, ch. 338, after authorizing the improvement, and establishing the method by which same shall be made and the cost collected, in the latter paragraph of section 9, and in reference to the collection of the assessment, provides: "That the same may be enforced and collected by suit instituted by the City of Kinston, in the Superior Court of Lenior County, and in his answer to the action so instituted, the owner shall have the right to deny the whole, or any part, of the amount claimed to be due by the city, and to plead any irregularity in reference to the assessment or any fact relied upon, to question the legality of the assessment, and the issues raised shall be tried, and the cause disposed of according to law and the course of practice of the court."

In the case before us it appears from the findings of fact, that the statutory methods have been strictly pursued. The order for the improvement was formally made, the work has been well done at a reasonable cost, and the amount assessed well within the limit allowed and established by the law; and in the present suit, instituted as provided by the statute, the defendants have been afforded opportunity to assert and establish every defense available to them, either by reason of irregularity or on the merits. In *Davidson v. New Orleans*, 96 U. S., 104, *Miller, J.*, delivering the opinion of the Court, said: "That whenever, by the laws of a State, or by State authority, a tax assessment, servitude, or other burden, is imposed upon property for the public use, whether it be for the whole State or for some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."

The objections of defendant, therefore, urged on the ground that no proper notice was provided for, cannot be sustained. The other objections adverted to in defendants' brief are not presented in the record, and, there being no valid objection shown, the judgment of the Superior Court is

Affirmed.

DORA ALLEN v. NORTH CAROLINA R. R. CO.

(Filed 2 December, 1908).

Railroads — Negligence — Lights — Signals—Crossings—Evidence—Nonsuit.

Plaintiff's intestate was killed by defendant's train, consisting of an engine and twenty freight cars, backing along its track on a dark night, without signals or warnings, and without lights on the rear car from the engine. At the place of the injury was an embankment on which was a track of another company running parallel with that of defendant. The injury occurred while plaintiff, an employee, was going home from his work, and crossing the tracks at a place where, to defendant's knowledge, people usually crossed. The evidence tended to show that on top and about the middle of the train were two men standing with lighted lanterns. *Held*, a judgment as of nonsuit upon the evidence should not be sustained, as the question was for the jury to determine whether the lanterns could have been readily seen at the time, and under the circumstances, by an observant person on the ground.

ACTION, heard before *Justice, J.*, and a jury, June Term, 1908, of MECKLENBURG, to recover damages for the alleged negligent killing of plaintiff's intestate, P. H. Allen.

At the conclusion of plaintiff's evidence, a motion to nonsuit was sustained, and the plaintiff excepted and appealed.

McNinch & Kirkpatrick and *Morrison & Whitlock* for plaintiff.

W. B. Rodman for defendant.

BROWN, J. The evidence tends to prove that the plaintiff's intestate was killed on defendant's track on 2 February, 1906, in the city of Charlotte. He was an employee of the Seaboard Air Line and had left his work to go to his home. The tracks of the Seaboard Air Line and defendant are parallel for some distance, and people habitually walk on the tracks of both roads along where the accident occurred. There is a path between the two roads, which crossed the track of the defendant twice between the two crossings. The scene of the accident was between the two crossings, on a very dark and windy night. A train operated on defendant's road, consisting of an engine and two box cars, moving backwards, the engine pushing the cars, struck the intestate and killed him.

The alleged scene of this accident is on an embankment some fifteen feet high, and about five hundred and eighty-six feet north of this crossing of the two railroads. The tracks of the defendant and the Seaboard Air Line are both located on this embankment, and ten feet eight inches apart.

The steam of the engine was shut off, and the train was moving down grade at the rate of about twelve miles per hour.

The plaintiff alleged three distinct acts of negligence, to-wit: that the defendant operated an engine and train of cars over a portion of its track running through A street, or if not A street, then a place used as a common walkway by the public in the city of Charlotte, on a very dark and rainy night, without having a light or other proper signal on the lead or forward car; that it ran the train faster than the law allowed; that it ran the train without ringing the bell as the law required.

We are of opinion that there is error in his Honor's ruling in sustaining the motion to nonsuit, and that, upon the evidence, he should have submitted the case to the jury upon proper issues and instructions.

It is in evidence that the car which was on the end of the backing train had no light on the end of it, but that two men were standing in the middle of it with lanterns in their hands hanging by their sides. As the cars, according to the evidence, are about fifteen feet in height from the earth and near thirty-six feet in length, we are unable to say whether lanterns so held in the middle of the car could be readily seen by an observant person on the tracks below. Much would depend upon the height at which the lantern was held above the top of the car. We think this is a matter peculiarly for the consideration of the jury as to whether a lantern so placed would answer the same purpose as one on the end of the car.

It has been repeatedly held by this Court that it is negligence in a railroad company to back its trains along a place used by the public, as a common walkway, in the night time, without a light on the end of the backing train so as to give warning of its approach.

It is true, as contended, that such breach of duty does not relieve the individual of all obligation to look and listen for engines and trains, when he attempts to walk on or cross the tracks of the company, nor does it absolve him from the consequences of such negligence. *Cooper v. R. R.,* 140 N. C., 209; *Heavener v. R. R.,* 141 N. C., 247.

But we find in the record nothing that would warrant a judgment of nonsuit upon the ground of contributory negligence, apparent from plaintiff's evidence.

There is also evidence, that although the whistle was blown for a crossing 586 feet from where the intestate was killed, the bell was not rung and no other signal given of the approach of the train after it passed the crossing.

We fail now to see how the speed of the train, whether four or twelve miles per hour, whether in violation of the city ordinance or not, could have been the proximate cause of the injury under the circumstances of this case, but that may be made clearer upon the next trial.

New trial.

ASHEBORO WHEELBARROW AND MANUFACTURING COMPANY v. SOUTHERN RAILWAY COMPANY.

(Filed 2 December, 1908).

Carriers of Goods—Penalty Statutes—Draft—Bill of Lading Attached—Title—Contracts.

There is no contractual relation between the carrier and a payee of a draft, in a shipment made to consignor's order, "notify," etc., "bill of lading attached to draft," until the draft is paid by him and the title to the goods passes; and until then, he cannot recover a penalty in his action against the carrier for delay in their transportation. (*Stone v. R. R.*, 144 N. C., 220, cited and distinguished.

ACTION tried before *Councill, J.*, and a jury, March Term, 1908, of RANDOLPH.

The record shows that on 6 December, 1906, the Carnegie Steel Co. delivered to the Pennsylvania Railroad Co., at Pittsburg, Penn., a carload of iron consigned to the Carnegie Steel Co., Asheboro, N. C., "notify Asheboro Wheelbarrow and Mfg. Co." The bill of lading was properly endorsed to the plaintiff company with a sight draft attached, and sent to bank for collection. Plaintiff paid the draft, took the bill of lading and received the carload of iron 17 January, 1907. It was delivered to defendant company at Alexandria 11 December, 1906, and reached Asheboro, N. C., 16 January, 1907. The distance between Alexandria, Va., and Asheboro is 300 miles. The car should have moved about 100 miles a day. There was evidence tending to show the value of plaintiff's plant, number of hands idle by reason of delay, wages paid, etc. The plaintiff sues for damages caused by the delay in delivering the iron. Defendant moved for judgment of nonsuit upon the plaintiff's evidence; motion denied, and plaintiff excepted. Defendant submitted several prayers for instructions in regard to the measure of damages, all of which were refused; defendant excepted. His Honor instructed the jury that the measure of damages was the legal interest on the capital invested in the plant during the time it was necessarily idle, as a result of the delay, and the wages paid the hands during such time. Defendant excepted. There was a verdict for plaintiff, assessing its damages at $100. Judgment. Defendant duly assigned error and appealed.

Elijah Moffitt for plaintiff.
J. T. Brittain for defendant.

CONNOR, J., after stating the case: It is unnecessary to discuss the exceptions directed to the admission of evidence, because we are of the opinion that his Honor should have granted the defendant's motion for judgment of nonsuit. It is common learning that when the vendor delivers an article to the common carrier to be transported by the usual route to the vendee, taking an open bill of lading, the title to the article passes to the vendee or consignee. This is true, although, by the terms of the sale, the vendee is to pay cash. For an injury to the article while in transit, or delay in transportation, or delivery, the carrier is liable to the consignee. *Stone v. R. R.,* 144 N. C., 220. Where, however, the goods were not to be the property of the vendee until delivered, the consignor may sue the carrier for delay. *Summers v. R. R.,* 138 N. C., 295. When the goods are shipped by bill of lading deliverable to the order of the vendor, in the absence of any evidence to the contrary, it is almost decisive to show his intention to reserve the *jus disponendi,* and to prevent the property passing to the vendee. Benja. on Sales (17 Ed.), 372, where the decided cases are cited and commented upon at length. *Dows v. Nat. Bank,* 91 U. S., 618. In *Bank v. Logan,* 74 N. Y., 568, *Folger, J.,* discusses the question and reviews the decided cases. In *Bank v. Crocker,* 111 Mass., 163, *Ames, J.,* says: "A carrier may be a mere bailee for the consignor; and when, by the terms of the bill of lading, the goods are to be delivered to the consignor's order, the carrier is his agent and not the consignee's . . . . . . In a contract of sale the fact of making the bill of lading deliverable to the order of the vendor, when not rebutted by evidence to the contrary, is decisive to show his intention to reserve the *jus disponendi* and to prevent the property from passing to the vendee."

"By such a bill of lading the seller does not reserve merely a lien, but the absolute right of disposal of the goods." 6 Am. & Eng. Enc., 1066, note 1. Until the draft is paid, the contract between the consignor and consignee is executory, that is, the consignor agrees to ship and place in the hands of the carrier the goods at the place designated, to be sold and delivered to the consignee when the draft is paid, both the title and possession remaining in the consignor until that time. If, in such case, the goods were injured or destroyed, the loss falls upon the consignor. If they are delayed in the carriage, the carrier is liable to the consignor. It is the fault of his agent. If the contract of the consignor imposed upon him the obligation to deliver the goods at any specified time, or in a reasonable time, and they are delayed by his agent, the consignee may recover of the consignor such damages as he may sustain as were in the contemplation of the parties. The only evidence in this case was that the goods were shipped to consignor's order, "notify" plaintiff. The authorities appear to be uniform that, in such case, the consignee is not brought into any contract relation with the carrier and must look to the consignor for any damage sustained by a delay, who, in turn, must look to the carrier. In *R. R. v. Barnes,* 104 N. C., 25, the buggy was shipped to the vendee to be delivered on payment of the purchase money. It delivered the goods without the payment of the money to the vendee, who sold to defendant. It was held that the plaintiff could not recover the buggy, because the title passed, by the shipment to the vendee. *Shepherd, J.,* says that if the *title* had not passed, the decision would have been different. It is manifest here that if the iron had been delivered to plaintiff without delivering the bill of lading to the carrier, no title would have passed. The defendant was the bailee of the vendor to deliver to plaintiff when the draft was paid and, until that condition precedent was complied with, it had no power to do so. Viewed from any aspect, it is clear that the plaintiff has no cause of action against the defendant. Judgment of nonsuit should have been rendered.

We do not wish to be understood as approving the ruling of the Court in regard to damages. There is nothing in the evidence, as set out in the record, to show that the case comes within the principle of *Rocky Mount Mills v. R. R.*, 119 N. C., 693, or *Mfg. Co. v. Express Co.*, 148 N. C., 87. There is nothing to indicate the use to which the iron was to be put, or that any special damage would be sustained by a delay in prompt shipment. In refusing the judgment of nonsuit, there was

Error.

W. R. LANEY v. HUTTON AND BOURBONNAIS.

(Filed 2 December, 1908).

1. **Justice's Court—Summons—Service on Non-Resident of County—Appearance—Waiver.**

   By entering a general appearance and demurring, a non-resident defendant of the county waives or cures the defect, in proceedings against him in a Justice's court, for want of service of summons ten days preceding the trial, as prescribed by Revisal, sec. 1451.

2. **Judgments — Justice's Court — Summons—Service—Irregularity—Voidable.**

   A judgment against a non-resident defendant of the county, obtained in a Justice's court without having had the ten days' previous service of the summons, as required by Revisal, sec. 1451, is not void but irregular, or, at most, voidable.

3. **Pleadings—Joinder of Actions—Demurrer—Misjoinder—Defense by Answer.**

When it appears, both by the summons and Justice's return, in an action brought in his court, that the plaintiff alleged a joint demand against the several defendants, a demurrer of defendants in the Superior Court for misjoinder of separate actions will not be sustained, as the allegations of the complaint must be taken as true, and such defense should be by way of answer. Revisal, sec. 477.

4. **Evidence—Declarations—Objections and Exceptions—Appeal and Error.**

Declarations made by a party and testified to on the direct examination by a witness, not objected to at the time, and gone fully into on cross-examination, cannot be considered on appeal.

5. **Evidence—Nonsuit.**

When there is some evidence that defendant had acknowledged his liability for a debt sued on, a motion for judgment as of nonsuit upon the evidence should be disallowed.

CIVIL ACTION tried before *Ferguson, J.,* and a jury, June Term, 1908, of CALDWELL. Defendants appeal.

M. N. Harshaw for plaintiff.
Mark Squires and *E. B. Cline* for defendants.

WALKER, J. This action was brought before a Justice to recover an indebtedness by the defendants to the plaintiffs for work and labor performed at their request.

The summons was issued 16 January, 1907, to Caldwell County for Will Wilkerson, who resided therein, and to Catawba County for Hutton and Bourbonnais, returnable 1 February, 1907. It was served on Hutton and Bourbonnais 28 January, 1907. They did not appear, and the Justice gave judgment for the plaintiffs on 1 February, 1907. Defendants afterwards appealed to the Superior Court. The defendants, Hutton and Bourbonnais, alone appealed to this Court. The jury returned a verdict for the plaintiffs, and judgment was entered thereon.

In the Superior Court, the defendants demurred for misjoinder of causes of action as each plaintiff had a separate cause of action. The defendants Hutton and Bourbonnais contended here that the action should be dismissed, as the Justice entered judgment when the summons had not been served ten days before the day on which it was returnable, contrary to Revisal, sec. 1451. The irregularity in this respect was waived, as the defendants did not appear before the Justice and ask for further time to plead, nor did they move before him to set aside the judgment, nor did they move in the Superior Court to dismiss, if that would have been a proper motion, but they entered a general appearance and demurred and, besides, have had full opportunity to plead to the merits and have the issues tried by a jury. The defect in the Justice's proceedings was thereby waived or cured. *Roberts v. Allman,* 92 N. C., 391; *Wheeler v. Cobb,* 75 N. C., 21. Section 1451 of the Revisal was evidently intended to afford the defendants a reasonable opportunity to appear and plead. The judgment was not void but irregular, or, at most, voidable. *Guion v. Melvin,* 69 N. C., 242; *Strayhorn v. Blalock,* 92 N. C., 293.

The demurrer for misjoinder was properly overruled, as it appears from the summons and Justice's return that the plaintiffs alleged that the debt was due to the plaintiffs jointly and not severally. If this was not true, the objection should have been taken by answer, for in passing upon the defendants' demurrer, we can consider only the allegations of the complaint. Revisal, sec. 477.

With regard to the declarations of Wilkerson, it may be said that the plaintiff, W. R. Laney, testified, without objection, that Hutton had told him that Wilkerson was working for Hutton and Bourbonnais and, on cross-examination by the defendants, he further testified as fully in regard to the matter and to the same effect.

The motion to nonsuit upon the evidence was properly overruled, as there was sufficient evidence to establish the plaintiff's claim. W. R. Laney testified that Hutton told him the debt was due and would be paid.

We have examined the numerous exceptions and find no error in the rulings of the Court. The exceptions not mentioned by us require no special discussion.

No error.

NEELEY HILL et al. v. B. F. LANE et al.

(Filed 2 December, 1908).

1. **Deeds and Conveyances—Proceedings for Division of Lands—Commissioners' Report — Original Papers — Burnt Records — Recording Report.**

   When a paper purporting to be an original report of a division of lands, in correct form and signed by the several commissioners, under seal, but which has never been registered, is presented to the Clerk of the court after the court-house has been burned and the records destroyed, with an entry thereon shown to be in the handwriting of a deceased former clerk, that the commissioners made the report in open court, and that the report was confirmed and ordered to be recorded, it is the duty of the Clerk, after satisfying himself upon evidence that the report is the original one, and that the entry is in the handwriting of the former clerk, to have the report recorded, even against the objection of a party in interest, in the absence of suggestion of fraud or that the report was not genuine.

2. **Same—Certificate—Color of Title.**

   When, after the records of the court have been destroyed by fire, a paper, appearing to be the original report of commissioners to divide lands, with an entry ordering registration made by a former clerk, and which has not before been registered, is recorded by the Clerk and registered, after having satisfied himself of its being the original and genuine, an allotment of a part of the land therein is color of title as to that tract, and a certified copy is competent evidence in an action involving that question.

3. **Deeds and Conveyances—Color of Title—Commissioners' Report—Recording—Presumption.**

   When a certified copy of a report of commissioners to divide land is put in evidence as color of title, by a party in interest claiming a part of the land therein described, it must be presumed, in the absence of proof to the contrary, that the paper was duly recorded in accordance with an order directing it.

4. **Deeds and Conveyances—Adverse Possession—Color of Title—Evidence—Nonsuit.**

When adverse possession of the land in question for more than seven years under a deed to a married woman is shown as color of title, and an ouster and continuous adverse possession of a part of the land contained in the description is shown during her coverture, and it further appears that the husband was entitled as tenant by the courtesy, and held possession after her death, to within two years next preceding the time of trial, and that the plaintiffs, the heirs at law, have had possession since then, the evidence is sufficient to carry the case to the jury, and a judgment as of nonsuit upon the evidence was properly disallowed, when title out of the State has been admitted.

5. **Married Women—Husband and Wife—Tenant by the Courtesy—Heirs at Law—Color of Title—Statute of Limitations.**

The statute of limitations does not begin to run against a married woman, in adverse possession of lands under color for the required time, by ouster of a part thereof during her coverture, or, after her death, against her heirs at law during the continuous adverse possession of the husband as tenant by the courtesy.

ACTION tried before *W. R. Allen, J.*, and a jury, May Term, 1908, of GREENE.

This action was brought for the recovery of a part of a tract of land, known as Lot No. 1 in the division of the land of Henry Edwards, deceased. The plaintiffs introduced in evidence the report of the commissioners to divide said land, by which it appears that Lot No. 1, including the land in controversy, was allotted to Richard Edwards, the father of Susan Beaman. The plaintiffs are the heirs-at-law of Susan Beaman. At the end of the report of the commissioners is the following entry:

"North Carolina—Greene County.
May Term, 1835.

Then was the foregoing report of commissioners made in open court, confirmed and ordered to be recorded.

Attest: WILLIAM WILLIAMS, *Clerk.*"

The report was found among the papers of N. H. Beaman, the husband of Susan Beaman, and Richard Edwards, her father, and was delivered by N. A. Beaman, son of N. H. Beaman, to the Clerk of the Superior Court of Greene County, in March, 1908. The report is correct in form and signed by the several commissioners under their seals. The Clerk of the Superior Court, upon evidence adduced before him as to the handwriting of William Williams, Clerk of the County Court, the Clerk who signed the certificate as to the genuineness of the report, found as a fact that it is the original report, and thereupon ordered it filed and recorded as a proper record of his office, and further ordered it to be registered, all of which was afterwards done. The court-house of Greene County was destroyed by fire, in 1876, with all the records and papers of the Court and of the office of the Register of Deeds, and there is no record of the partition proceedings in the Clerk's or Register's office.

It appears in the body of the report that it was returned by the commissioners to the February Term, 1835, of the Court of Pleas and Quarter Sessions. It does not appear whether or not the testimony as to the genuineness of the report was taken after notice to the defendants. The report was offered by the plaintiffs as color of title, and it was admitted by the Court for that purpose only. Defendants excepted.

W. M. Caraway, a witness for the plaintiffs, testified: "I am sixty-six years old. Knew Susan C. Beaman. She was the daughter and only child of Richard Edwards, and was raised on the tract of land in controversy. I know the boundaries of Lot No. 1 in the division of the lands of Henry Edwards. These boundaries cover the land in dispute. The plaintiffs are the heirs-at-law of Susan C. Beaman, daughter of Richard Edwards. Susan C. Beaman has been dead about twenty years. She was married to N. H. Beaman. He has been dead about two years. N. H. Beaman was in possession of Lot No. 1 after the death of Susan C. Beaman. James Jones took possession of the land in dispute about fifty-two years ago. Susan C. Beaman was then a married woman."

(At this point, the defendants admitted that the title to the land in controversy was out of the State, and further admitted that Susan C. Beaman was in possession of the land in controversy from her childhood to her death).

N. A. Beaman, a witness for the plaintiffs, testified: "My mother has been dead about twenty-nine years, and she was about thirty-two years old when she died. After the death of my mother, my father was in possession of all of Lot No. 1, except the disputed part. He died in September, 1906. I am forty-two years old. My father and mother have been in possession of Lot No. 1 as long as I can recollect, except that James Jones was in possession of the disputed part when I first knew it. Jones sold to Faircloth. Faircloth went into possession of the disputed part, and died eight or ten years ago. Faircloth conveyed to Lane."

(It is admitted that Susan C. Beaman was in possession of the land in controversy during the whole of her life up to the time James Jones went into possession and that, since that time, Jones, Faircloth and Lane have been in possession of the land in controversy).

Plaintiffs rested, and thereupon the defendants moved to nonsuit the plaintiffs. The motion was overruled, and the defendants excepted. The jury returned a verdict for the plaintiffs. Defendants' motion for a new trial having been overruled, and a judgment entered upon the verdict, the defendants appealed.

L. V. Morrill and *C. B. Aycock* for plaintiffs.

Wooten & Clark, Abernathy & Davis and *Paul Frizzelle* for defendants.

WALKER, J., after stating the case: The Court below properly admitted in evidence the report of the commissioners as color of title. This was not an attempt to restore a burnt or lost record, but the report of the commissioners was a part of the original record in the cause. It was itself an original paper and it was not necessary to resort to parol or other evidence, such as a certified copy extant, to prove the contents of the original, as would be required in the case of a lost or burnt record. When the Clerk was satisfied that the record was an original paper belonging to his office and which should be spread upon its records and registered, under the order of the Court which appeared upon its face, it was not only within his authority, but it was his duty to file and record the paper. *Greenlee v. McDowell,* 39 N. C., 484; *Harris v. McRea,* 26 N. C., 81; *Botelor v. State,* 21 Md. (8 Gill & J.), 383; *State v. Morris,* 84 N. C., 757. In *Greenlee v. McDowell, supra,* the Court says: "The plaintiff's allegation is that, upon the loss of the records of the former suit, a copy of the original bill, properly certified by the Clerk, was filed without and against his consent; and that no copy has been served upon him. He further alleges, that the amendments upon it, and the entries upon the record, were made without his knowledge or consent. That the records and papers had been lost or destroyed, is stated by the plaintiff; and, in that case, it cannot be doubted that the Court, without or against the will of the plaintiff, had full power to order a copy of the original bill to be filed. That the copy filed was a correct one is not questioned." It must be presumed in the absence of any proof to the contrary, that the Clerk duly recorded the report in his office and it was registered in accordance with the order of the Court. It is provided by the Revisal, sec. 328 (Code, sec. 56), that all original papers, once admitted to record or registry, whereof the record or registry is destroyed, may, on motion, be again recorded or registered, on such proof as the Court shall require. But as the report was recorded by the Clerk, upon satisfactory proof, and a duly certified copy was introduced in evidence, it was competent, in the absence of any suggestion that the report was not genuine or had been forged. There was no such intimation, although it was open to attack by the defendants in the proper way. It had, on the contrary, every appearance of being the original report, duly certified by the Clerk of the County Court, to which it was returned, as having been confirmed and ordered to be recorded in his office and registered as required by the statute. It was color of title, as the Judge correctly held. *Bynum v. Thompson,* 25 N. C., 578; *Smith v. Tew,* 127 N. C., 299; *Lindsey v. Beaman,* 128 N. C., 189.

The motion to nonsuit was properly overruled. While the evidence is somewhat meagre, it was sufficient for the consideration of the jury and tended to show an adverse possession in Susan C. Beaman for more than seven years under color, and, also, that she was seized in deed during the coverture, so as to entitle her husband to an estate by the courtesy at her death. This estate for his life suspended the operation of the statute of limitations, as a bar to the plaintiffs, during its continuance. There was some uncertainty as to when James Jones took possession of the land, and there was evidence that, whenever it was, Susan C. Beaman was at the time a married woman, so that the statute did not run against her during her coverture. The charge of the Judge to the jury is not in the record, and we must assume that they were correctly instructed as to the law applicable to the case.

The parties having admitted that the title to the land was out of the State, and the jury having found, under sufficient evidence, that the plaintiffs and those under whom they claim, had acquired the title by adverse possession under color, and that the statute of limitations had not barred the plaintiffs' right of entry. There was no error in the judgment.

No error.

M. E. WHITEHURST v. THE LIFE INSURANCE COMPANY OF VIRGINIA.

(Filed 2 December, 1908).

1. **Insurance—Contracts—False Representations — Expressions of Opinion—Statements of Fact—Questions for Jury.**

   Declarations, though clothed in the form of an opinion or estimate, made by a duly authorized agent to induce a contract or policy of insurance, accepted and reasonably relied upon by the other party as statements of facts, may be considered upon the question of whether fraud had been thereby perpetrated; and when there is a doubt as to whether they were intended and received as mere expressions of opinion, or statement of facts to be regarded as material, the question is one for the jury.

2. **Insurance—Contracts—Principal and Agent—Agent's False Representations—Knowledge Imputed—Liability.**

   When an agent of an insurance company has induced the insured to take a policy of insurance in his company by making misrepresentation of a material fact concerning which, as such agent, he should have known the truth, or makes it recklessly, or affirms its existence positively, when he is consciously ignorant whether it be true or false, his principal may be held responsible by the insured relying, and having reasonable ground to rely, upon the agent's statement as importing verity.

3. **Same.**

   A stipulation in a policy of life insurance, among other things, gave the plaintiff, the insured, the option to "surrender this policy and withdraw the entire cash value, that is, the legal reserve, computed according to the actuary's table of mortality, and four per cent. interest, together with the dividend." There was evidence tending to show that the agent of the defendant, the insurance company, induced the plaintiff, a blind man, to take out the policy by reading this stipulation to him, and falsely informing him that the company, at the end of ten years, would pay back the premiums with interest. *Held*, (1) It was a question for the jury as to whether these assurances were intended as statements of fact, accepted and reasonably relied upon by plaintiff as a material inducement to the contract; (2) An affirmative finding of the jury thereon established an actionable fraud imputable to defendant company, entitling plaintiff to recover the premiums paid, and interest.

ACTION tried before *W. R. Allen, J.,* and a jury, February Term, 1908, of CRAVEN.

At the close of plaintiff's testimony, and again at the close of the entire testimony, there was motion of nonsuit under the Hinsdale Act, motions refused, and defendant excepted. On issues submitted the jury rendered the following verdict:

"(1) Did the defendant falsely represent to the plaintiff that, under the policies in controversy, the plaintiff would be repaid the amount of premiums paid by him, with about 4 per cent. interest thereon, at the expiration of ten years?

Answer: 'Yes.'

(2) If so, did the plaintiff rely on said representations, and was he induced to accept said policies?

Answer: 'Yes.'

(3) Has the plaintiff waived the right to rely upon failure to deliver to the plaintiff policies that provided for the return of premiums paid, and about 4 per cent. interest, at the expiration of ten years?

Answer: 'No.'

(4) Is the defendant indebted to the plaintiff, and if so, in what sum?"

And thereupon the Court rendered judgment as follows:

"This cause coming on to be heard before his Honor, Judge W. R. Allen, and a jury, and being heard, and the jury having answered all the issues in favor of the plaintiff, except the one as to the quantum of damages, and the amount and dates of payments having been agreed upon, and it having been agreed that his Honor should answer the issue as to the quantum of damages, and his Honor having found that the payments together with interest on each up to the 10th day of February, 1908, amounted to three hundred and fifty-nine and 63-100 ($359.63) dollars:

"It is therefore considered by the Court, and adjudged that the plaintiff recover of the defendant three hundred and fifty-nine 63-100 dollars, with interest thereon from the

10th day of February, 1908, till paid, and the costs of the action to be taxed by the Clerk."

Defendant excepted and appealed.

H. C. Whitehurst and *Simmons, Ward & Allen* for plaintiff.

W. W. Clark for defendant.

HOKE, J., after stating the case: We find no reversible error in the record, and are of the opinion that the case has been tried in substantial accord with the principles announced and upheld in the cases of *Caldwell v. Insurance Co.*, 140 N. C., 100; *Sykes v. Insurance Co.*, 148 N. C., 13; *Stroud v. Insurance Co.*, 148 N. C., 54, and other decisions of like import.

There was evidence tending to show that plaintiff obtained, and held for some time, a policy in defendant company, containing, among others, a stipulation as follows: "That if plaintiff should be living at the end of ten years, the policies could be continued or surrendered by the insured under one of the following options: I. . . II. . . . III. . . . IV. Surrender this policy and draw the entire cash value, that is, the legal reserve, computed according to the Actuary's Table of Mortality, and 4 per cent. interest, together with the dividend"; that plaintiff was blind and unable to read the policy himself, and that, at the time the contract was entered into, and as inducement thereto, the defendant's agent read the policy to plaintiff, and told plaintiff that at the end of ten years the whole amount paid in would be returned with interest; that the agent explained the 4th clause to mean that "the company would pay the premium back at the end of ten years," etc.; and that plaintiff accepted the policies and paid the premiums thereon to the amount indicated, relying upon these statements and assurances of defendant's agent referred to, etc. On this evidence we think his Honor correctly ruled that the questions at issue should be submitted to a jury.

While it is a correct principle, as we have held in *Cash Register Co. v. Townsend,* 137 N. C., 652, that expressions of commendation and opinion, or extravagant statements as to value, or prospects and the like, are not, as a rule, regarded as fraudulent in law, it is also true that, when assurances of value are seriously made, and are intended and accepted and reasonably relied upon as statements of fact, inducing a contract, they may be so considered in determining whether there has been a fraud perpetrated; and, though this declaration may be clothed in the form of opinion or estimate, when there is doubt as to whether they were intended and received as mere expressions of opinion or as statements of fact to be regarded as material, the question must be submitted to the jury. 14 A. & E., page 35; 20 Cyc., page 124; *Morse et al. v. Shaw,* 124 Mass., 59.

In 20 Cyc., *supra,* it is said: "Whether the representation was merely the expression of opinion or belief, or was the affirmation of a fact to be relied upon, is usually a question for the jury, so ordinarily it is for the jury to say whether representations as to value, solvency, or a third person's financial ability, are statements of fact or opinion."

And it is not always required, for the establishment of actionable fraud, that a false representation should be knowingly made. It is well recognized with us that, under certain conditions and circumstances, if a party to a bargain avers the existence of a material fact recklessly, or affirms its existence positively, when he is consciously ignorant whether it be true or false, he may be held responsible for a falsehood; and this doctrine is especially applicable when the parties to a bargain are not upon equal terms with reference to the representation, the one, for instance, being under a duty to investigate, and in a position to know the truth, and the other relying and having reasonable ground to rely upon the statements as importing verity. *Modlin v. R. R.,* 145 N. C., 218; *Ramsey v. Wallace,* 100 N. C., 75; *Cooper v.*

Schlesinger, 111 U. S., 148; Pollock on Torts, 7 Ed., 276; Smith on the Law of Fraud, sec. 3; Kerr on Fraud and Mistake, 68.

The conditions under which these misrepresentations as to material facts in the course of a bargain may be made the basis of an action for deceit, as a general proposition, will be found very well stated in Pollock, *supra*, as follows:

"To create a right of action for deceit there must be a statement made by the defendant, or for which he is answerable as principal, and with regard to that statement all the following conditions must concur:

(a) It is untrue in fact.

(b) The person making the statement, or the person responsible for it, either knows it to be untrue, or is culpably ignorant (that is, recklessly and consciously ignorant) whether it be true or not.

(c) It is made with the intent that the plaintiff shall act upon it, or in a manner apparently fitted to induce him to act upon it.

(d) The plaintiff does act in reliance on the statement in the manner contemplated or manifestly probable, and thereby suffers damage."

And as to responsibility for these statements attaching, when the parties are not upon equal terms in reference to them, it is said in Smith on Fraud, *supra*:

"The false representation of a fact which materially affects the value of the contract and which is peculiarly within the knowledge of the person making it, and in respect to which the other party, in the exercise of proper vigilance, had not an equal opportunity of ascertaining the truth, is fraudulent. Thus representations made by a vendor to a purchaser of matters within his own peculiar knowledge, whereby the purchaser is injured, is a fraud which is actionable. Where facts are not equally known to both sides a statement of opinion by one who knows the facts best involves very often a statement of a material fact, for he, impliedly, states that he knows facts which justify his opinion."

And so in Kerr on Fraud and Mistake, page 68:

"A misrepresentation, however, is a fraud at law, although made innocently, and with an honest belief in its truth, if it be made by a man who ought in the due discharge of his duty to have known the truth, or who formerly knew, and ought to have remembered, the fact which negatives the representation, and be made under such circumstances or in such a way as to induce a reasonable man to believe that it was true, and was meant to be acted on, and has been acted on by him, accordingly, to his prejudice. If a duty is cast upon a man to know the truth, and he makes a representation in such a way as to induce a reasonable man to believe that it is true, and is meant to be acted on, he cannot be heard to say, if the representation proves to be untrue, that he believed it to be true, and made the misstatement through mistake, or ignorance, or forgetfulness."

Applying the principle announced and sustained by these authorities, we are of opinion, as stated, that the motion to nonsuit, entered by defendant, was properly overruled. The policy held by plaintiff in defendant's company contained stipulations to some extent ambiguous and certainly indefinite; and when an agent of defendant company, in the effort to induce plaintiff to take out the policy, said to him that, under one of these stipulations, "the company at the end of ten years would pay back the premiums with interest," we think that, under the conditions attending the transaction, and having due regard to the respective positions of the parties, it was a question for the jury as to whether these assurances, given by defendant's agent, were intended as statements of fact, accepted and reasonably relied upon by plaintiff as a material inducement to the contract, and that the verdict establishes an actionable fraud, imputable to defendant company, entitling plaintiff to recover the premiums paid and interest, *Sykes v. Ins. Co., supra.*

There is no error, and the judgment below is affirmed.

No error.

HENRY A. HAINES et al. v. SMITH AND PINCHBACK.

(Filed 2 December, 1908).

Burden of Proof—Instructions—Charge Construed as a Whole—Burden of Proof.

There is no reversible error in the charge of the Court to the jury imposing the burden of the issue upon defendant, in an action to recover upon a note secured by a mortgage, when the charge, construed as a whole, clearly places the burden upon the plaintiff, the proper party.

ACTION tried before *Justice, J.*, and a jury, January Special Term, 1908, of GASTON.

The action was to recover the amount of a note for $3,000, secured by a mortgage on property, executed by defendant Pinchback, endorsed by him to his co-defendant Smith, and by him assigned by endorsement to plaintiffs. On issues submitted, there was verdict for plaintiffs, and defendants excepted and appealed.

O. F. Mason and *Clarkson & Duls* for plaintiff.

A. G. Mangum and *Tillett & Guthrie* for defendant.

PER CURIAM. The objection to the validity of this trial, chiefly insisted on by defendants, was for alleged error in a portion of his Honor's charge in reference to the burden of proof. The execution of the note and mortgage and transfer by endorsement to plaintiffs, were admitted on the trial, and the evidence tended to show that these instruments were executed and assigned to plaintiffs to secure them for certain advancements made, and to be made, by plaintiffs, and the plaintiffs' evidence tended to show, that, under this contract, they had made advancements to defendants, and that more than $8,000 of such money was unpaid and still due from defendants. Defendants, in their answer, denied any and all indebtedness by reason of these advancements, and claimed, further, that any and all advancements made by plaintiffs to defendants had been fully paid.

In connection with this denial of indebtedness, the answer contained further statement indicating that the note and mortgage had been assigned to secure advancements to the amount of $8,533, alleged by plaintiffs to have been already made, and on condition that additional advancements should be made by plaintiffs; but these allegations do not lead to any definite averment, and, as we interpret the answer, it amounted to a denial of any indebtedness and a claim of payment, and we do not discover in the record any objection to the issues submitted; one being on the indebtedness by note and mortgage, and the second as to the amount of same. The Court charged the jury, on these issues, and the portion of the charge objected to was that wherein his Honor told the jury that plaintiffs, having produced the note and mortgage in question, and the execution and assignment by endorsement to plaintiffs having been admitted, this would make a *prima facie* case, and thereupon the burden would shift to defendants to establish, by the greater weight of the evidence, that the contention made by defendants, in order to discharge themselves from liability in the note, was true. The position being, that as the evidence showed that the note was given as collateral, its production and proof of execution did not make out plaintiffs' case of itself, but it was still incumbent on plaintiffs to establish the indebtedness and the amount thereof by evidence *ultra.*

The position is no doubt correct, but we do not think it is available to defendants on this record. We have held, in several recent decisions:

"The charge to a jury must be considered as a whole in the same connected way in which it was given, and upon the presumption that the jury did not overlook any portion of it. If, when so construed, it presents the law fairly and correctly, it will afford no ground for reversing the judgment, though some of the expressions, when standing alone, might be regarded as erroneous."

And a correct application of this wholesome principle will show that the charge is free from reversible error. The Court at the outset had placed the burden of this issue of indebtedness on the plaintiffs, and, in the closing paragraph of the charge, had told the jury: "If upon all the testimony, taking into consideration the defense set up by defendants, or if upon all the testimony given, you are satisfied, by the greater weight of the evidence, that the defendants are indebted to the plaintiffs you will answer the first issue 'Yes.'" Taking the charge as a whole, we think the burden of the issue, to establish the debt secured by the mortgage, was clearly placed on the plaintiffs, and, in the portion of the charge objected to, the Court, in placing upon the defendants the burden of establishing their "contention" could only have referred to defendants' position as to payment, and the charge was no doubt so understood by the jury.

Every position available to defendants on the evidence was fairly presented to the jury in the principle charge of the Court, and in response to defendants' prayers for instruction, which were given to the jury without substantial alteration.

We find no error in the record, and the judgment is affirmed.

No error.

EDWARD FAISON et al. v. THOMAS KELLY.

(Filed 2 December, 1908).

1. **Wills—Estates—Tenant for Life—Deeds and Conveyances—Betterments, Recovered When.**

A claim for betterments may be set up by way of answer and recovered by the defendant, a grantee for value of a tenant for life in a deed conveying the fee, in an action to recover possession by the remainderman, when it appears that the life tenant, now deceased, held under a devise in a will under such terms or expression as to leave it uncertain whether the devise was of a life estate or the fee, and when the defendant made the improvements at a time he believed, and had good reason to believe, that he was the true owner.

2. **Same—Evidence—Questions for Jury.**

When there is evidence that defendant had been in possession of lands, asserting absolute ownership for more than thirty years, under a deed conveying to him a title in fee, executed by a devisee thereof and by a trustee named in the will, and had put permanent improvements thereon; that the land had been bought and paid for by defendant, and the deed taken under advice of counsel learned in the law, that the deed conveyed the true title; that the lower Court construed the will to convey the fee, but was overruled by the Supreme Court, holding that only a life estate was devised, and that the remainderman was entitled to the possession as the owner of the fee. *Held*, the evidence is relevant to the inquiry, and the claim for betterments should be submitted to the jury. (*Merritt v. Scott*, 81 N. C., 385, cited and distinguished).

ACTION to recover land, tried before *W. R. Allen, J.*, and a jury, December Special Term, 1907, of SAMPSON.

Plaintiffs, as children and issue of Edward L. Faison, deceased, claimed the land in controversy, under and by virtue of the will of Wm. Faison, in terms as follows:

"Eighthly: I give, devise and bequeath unto my son, Matthew J. Faison and his heirs, in trust, for the use and benefit of my son, Edward L. Faison, during his life, after the determination of my wife's estate in the lands devised to her, the land whereon I reside, my chestnut lands on the west side of Six Runs, my Meares, Fortner, Davis, Herring and Brewington lands in Rowan, my stock thereon, and after the death of my said son, Edward, to his issue forever, and in case of his death, without leaving issue, I give, devise and bequeath the lands devised in trust to him unto his surviving brothers and their heirs; and in case of their death before him and leaving children, to such issues and their heirs." And it was admitted that the land in controversy was included in the description.

Defendant denied plaintiffs' ownership, and claimed the lands under deeds conveying same to him in fee executed by said Edward L. Faison and wife and Matthew J. Faison, now dead, the trustee mentioned in the will. And defendant alleging the validity of the deeds under which he claimed the land, alleged, further, that, while in possession of said land claiming to own the same under these deeds, assuming to have title, he had made permanent and valuable improvements thereon to the amount of $1,500, etc.

On issues submitted the jury rendered the following verdict:

"First. Are the plaintiffs the owners of and entitled to the immediate possession of the land in controversy? Answer: 'Yes.'

"Second. What is the annual rental value of the land in question? Answer: '$100.'

"Third. Did the defendant take the deed set out in the pleadings in good faith, believing thereby he was acquiring a fee simple title to the land in controversy? Answer: 'Yes'.

"Fourth. If so, did he make permanent improvements thereon in good faith and under such belief? Answer: 'Yes.'

"Fifth. If so, what is the value of the improvements? Answer: '$1,000.00.' "

Thereupon judgment was rendered that plaintiffs owned the land sued for, and were entitled to recover possession of same on payment into Court, for defendant's benefit, of the sum of $725.00, the difference between the rental due and the value of the improvements as assessed by the jury. Plaintiffs excepted and appealed.

Geo. E. Butler for plaintiff.

Faison & Wright, Fowler & Crumpler and *J. D. Kerr* for defendant.

HOKE, J., after stating the case: In *Faison v. Odom,* 144 N. C., 107, the Court, construing the clause of the will here in question, held that the same conferred only a life estate on the grantor of defendants, the Edward L. Faison mentioned in the will, and that, on his death, the plaintiffs, his children, could recover the land. In accordance with this ruling, the plaintiffs recovered the land, and the question presented in this appeal is in reference to defendant's claim to betterments. Speaking to this question, in a recent decision, *Alston v. Connell,* 145 N. C., 4, the Court said:

"This doctrine of betterments, and the principle upon which it was originally made to rest, is very well stated by *Ashe, J.,* in the case of *Wharton v. Moore,* 84 N. C., 482, as follows: 'This right to betterments is a doctrine that has gradually grown up in the practice of the courts of equity, and while it has been adopted in many of the States, it is not recognized in others. But it may now be considered as an established principle of equity that whenever a plaintiff seeks the aid of a court of equity to enforce his title against an innocent person who has made improvements on land without notice of a superior title, believing himself to be the absolute owner, aid will be given him only upon terms that he shall make due compensation to such innocent person to the extent of the enhanced value of the premises by reason of the meliorations or improvements, upon the principle that he who seeks equity must do equity.' Here it will be noted that the claimant must be an innocent person, and in any correct statement of the principle will be found this or some equivalent requirement indicating that the occupant made the expenditures in good faith—that is, that he believed, and had reasonable ground to believe, at the time they were made, that he was the true owner."

Under this statement of the doctrine, it will be noticed that, in order to make his claim good, it is incumbent on defendant to show that the improvements were made in good faith, at a time when he believed, and had good reason to believe, that he was the true owner. And we are of opinion that, on the testimony, every essential of this requirement has been met; for, while the Court of last resort has held that the clause of the will in question gave to defendant's grantor, E. L. Faison, only a life estate, this construction overruled the decision of the lower Court, which had taken a contrary view of its meaning, showing that the matter was not free from difficulty. And it furthermore appeared that the defendant had been in possession of the land, asserting absolute ownership, for more than thirty years, under a deed conveying to him a title in fee executed by Edward L. Faison and wife and Matthew J. Faison, the trustee named in the will, and that the land had been bought and paid for by defendant, and these deeds taken under advice of counsel learned in the law, that the execution of the deeds by Edward L. Faison and the trustee, would convey the true title. The testimony offered by defendant tending to establish these facts was directly relevant to the issue, and, under the circumstances indicated, we are of opinion that, under our decisions, the Court, as stated, correctly ruled that the defendant's claim for betterments should be submitted to the jury. *R. R. v. McCaskill,* 98 N. C., 526; *Justice v. Baxter,* 93 N. C., 405.

We do not understand that the decision of *Merritt v. Scott,* 81 N. C., 385, cited and relied on by plaintiffs, is contrary to the disposition we make of the present appeal. In that case, as we interpret it, John Merritt, who had a life estate in the land in controversy, and who was in possession, claiming to own such interest, conveyed this life estate to one John Cox, and on the death of John Cox, his administrators, under Court proceedings, sold the land and conveyed same to defendant in fee. On action brought by the remaindermen, the defendant sought to set up a claim for betterments, by reason of improvements made by the life tenant when he was in possession claiming the land as life tenant, and also for improvements by himself after he purchased and obtained a deed for the land, and the Court, in disallowing the claim for improvements made by the life tenant, said:

"We think it clear that improvements of any kind put upon land by a life tenant during his occupancy, constitute no charge upon the land when it passes to the remainderman. He is entitled to the property in its improved state, without deduction for its increased value by reason of good management, or the erection of buildings by the life tenant, for the obvious reason that the latter is improving his own property and for his own present benefit. This proposition is too plain to need the citation of authority."

The defendant seems to have recovered for improvements made by him after he bought the land and entered, claiming to own the same in fee, having a deed purporting to convey such a title, and in that view the decision is authority favoring defendant's position.

The objection further made, that defendant's claim could not be asserted on this trial, is without merit. By fair intendment, the claim was made in the answer, and the disposition of the matter at the same time the question of title was disposed of, is directly sanctioned by the statute. Revisal, section 652, under the title of "Betterments," contains the provision: "That in any such action, such enquiry and assessment may be made upon the trial of the cause."

There is no error, and the judgment below is affirmed.

No error.

D. A. BARKLEY v. SOUTH ATLANTIC WASTE COMPANY.

(Filed 2 December, 1908).

Employer and Employee—Negligence of Employee—Construction of Scaffold—Vice Principal.

When an employee has been instructed by the employer to do certain work upon a scaffold, and he was injured, owing to a negligent and faulty construction of the scaffold by another employee entrusted to build it, it is not necessary that the employee entrusted to build the scaffold be a vice principal, in order to hold the employer liable for an injury which is the proximate cause of the negligent act.

ACTION tried before *Moore, J.*, and a jury, June Term, 1908, of Mecklenburg. Defendant appealed.

Brevard Nixon, J. F. Newell and *J. D. McCall* for plaintiff.

Morrison & Whitlock for defendant.

PER CURIAM. As the learned counsel for the defendant were prevented by unavoidable delay, from favoring us with an argument, we have given their carefully prepared brief, as well as the record, a very careful examination. There are no assignments of error presented in their brief relating to the rejection or admission of testimony. All the alleged errors pointed out and discussed relate to the charge of the court. To discuss them *seriatim* is unnecessary and would be simply in large measure repeating what has been said in the opinion of Mr. Justice Brown on the former hearing of the case. 147 N. C., 586.

There is abundant evidence to show that Michael in his relation to plaintiff was not a fellow servant but a vice principal, applying the test contended for by the defendant. But whether Michael was a fellow servant or not is not essential in the determination of this case.

We have held that "the defendant company owed to its employees, who were directed to work on this scaffold, the duty to exercise due care in selecting materials reasonably suitable and safe for its construction." p. 587.

There is evidence that the defendant delegated the performance of this duty to Michael and, therefore, whatever place in its service Michael filled, the defendant is responsible for the manner in which he discharged this duty. *Tanner v. Lumber Co.,* 140 N. C., 475, and cases cited in former opinion.

The law of this case was settled on the first appeal, and the questions now presented are almost exclusively of fact. We think his Honor correctly presented the matter to the jury in the light of our former opinion.

No error.

P. H. MOORE et al. v. LEROY PARKER and Wife.

(Filed 2 December, 1908).

Water and Water Courses—Diverting Stream—Right of User—Extent of Right.

W. A., during his life, diverted the waters of R. Creek, so as to run into H. Creek to obtain additional water to supply his mill, and made an obstruction or dam in R. Creek at a certain height. After his death, his lands were partitioned among his heirs at law, and there was evidence that the plaintiff received the part upon which the mill was situated, with a provision, including the "full power of the mill shoal and water power on both sides of the mill, so as to keep it in repair and convey water to the mill," and the defendant received that part on which the dam on R. Creek was situated. Plaintiff sued for damages for defendant's obstructing his right to the use of the waters of R. Creek for milling purposes. *Held,* (1) It was not error in the trial Judge to instruct the jury that the plaintiff had the right to use the waters of R. Creek to the same extent as they find, from the greater weight of the evidence, W. A. had diverted it, if it was in contemplation of the commissioners at the time they made the partition; (2) The verdict being for plaintiff, he had the right to enter upon defendant's lands for the purpose of keeping open the channel as originally used, and to keep up the dam at its original height; (3) The "full power" of the water is that required to run the mill with the dam at its original height, and it was not necessary for the jury, in this action, to find the quantity of water originally used.

ACTION tried before *Ferguson, J.*, and a jury, May Special Term, 1908, of WILKES.

Action against defendants for obstructing plaintiff's use of water from Rocky Creek to aid in running his mill, and counterclaim pleaded because plaintiff, by raising his dam, had water sobbed the land of defendant. The jury gave each side a verdict for $100.00.

The lands of the plaintiff and defendant formerly belonged to William Anderson. Hunting Creek and Rocky Creek both flowed through the lands of William Anderson. Upon the bank of Hunting Creek William Anderson built a mill.

Rocky Creek by its natural course ran into Hunting Creek about 100 yards below the mill, and naturally the water of Rocky Creek furnished no additional power to Anderson's mill. Anderson being the owner of the land, conceived the idea of increasing the power of his mill by cutting an artificial channel from Rocky Creek into the head of his mill pond on Hunting Creek. This channel was cut over the land which afterwards became lot No. 4, in the partition proceedings, and fell to the defendants.

After cutting this channel, it was necessary to keep a little dam or obstruction in Rocky Creek at the mouth of the channel in order to divert the water from its natural flow. William Anderson had the right, of course, to construct this channel, and to keep it in repair, and use the water for the purpose of increasing the power of his mill. During the remainder of his lifetime, he used the channel for thus conveying water whenever needed. At his death a partition proceeding was filed by his heirs at law for a division of his lands.

The commissioners went upon the premises, and divided his lands into nine parts. This mill being situated upon the lands, in making a division, its value was considered. The mill without the water power, would be of very little value. It stood upon lot No. 9 owned by plaintiff, as to which the allotment provided, "so as to include the full power of the mill shoal and water power on both sides of the mill pond, so as to keep it in repair and convey water to the mill." From the verdict and judgment, the defendant appealed.

W. W. Barber for plaintiff.
Finley & Hendren for defendant.

CLARK, C. J. His Honor charged the jury: "It is conceded by both parties that William Anderson owned the lands in controversy, and that partition was had between his heirs, to one of whom section 9 was assigned, including the mill on Hunting Creek, and without giving a description of the land assigned it to C. L. Anderson. This provision is added to the general description: 'So as to include full power of the mill shoal and water power on both sides of the mill pond, so as to keep it in repair to convey water to the mill.' If you find from the evidence, by its greater weight, that at the time the partition was had, and therefore while William Anderson was the owner of all the lands set out in the partition proceedings, and the owner of the mill, that water was brought from Rocky Creek into the mill pond as a part of the water power necessary for running the mill, that the water power was included in the partition proceedings and assigned to C. L. Anderson, who was to be the owner of section No. 9, and if you should so find, then you will inquire whether the defendant has diverted the water from that course so as to lessen the water-power used by Anderson, and in contemplation of the Commissioners at the time they made the partition."

The defendant excepted, but we find no error. The jury found that the defendant had wrongfully diverted the water, and wrongfully refused to allow the plaintiff to convey the water from Rocky Creek, to his damage $100.00, and that the plaintiff had maintained his dam at a height greater than the mill dam was at the time of the partition, thus overflowing and sobbing defendant's land to his damage $100.00. The Court thereupon adjudged that "the plaintiff is entitled to the use of the same amount of water as was usual to run through the artificial channel from Rocky Creek to the head of the mill pond of plaintiff, when a dam or obstruction was in the creek at the head of the channel, at or prior to the date of the partition of the lands of William Anderson, and such amount of water as was used by the said William Anderson, and the plaintiff shall have a right to enter upon the lands of the defendant for the purpose of keeping open the artificial channel used for diverting water from Rocky Creek to the mill pond, and also for the purpose of keeping such dam or obstruction in the creek as will cause the water to flow through the artificial channel in such quantity as was used by William Anderson during his lifetime, for the purpose of furnishing power to the mill. It is further ordered and adjudged by the Court that the plaintiff recover of the defendant the sum of one hundred dollars for damages for the wrongful diverting of the water from the mill pond of the plaintiff's mill. It is further considered and adjudged by the Court, that the jury having found that the plaintiff is maintaining his dam in excess of what it was at the date of the partition proceedings, and that by reason of said dam being raised and so maintained the land of the defendant has been sobbed, it is therefore considered and adjudged by the Court that the defendant recover of the plaintiff the sum of one hundred dollars for all damage—past, present and prospective, by reason of the raising of the dam to its present height, both parties consenting that the amount named should be for all damages. It is further considered and adjudged by the Court that the plaintiff recover cost of the defendant in his action."

The defendants except, because the jury did not find how much water from Rocky Creek William Anderson was accustomed to use, but they submitted no issues or prayers on that subject. The contest was whether the plaintiff had an easement to use the water as William Anderson had done. There was no demand to more particularly specify its extent. The easement was to use enough water from Rocky Creek, added to that from Hunting Creek, to "include the full power of the mill shoal and water power on both sides of the mill pond" at the height of the dam when the mill was used by William Anderson, and now by this verdict, and with the consent of parties as expressed in the judgment, the "full power" is what is required to run the mill with the dam at its present height. If the plaintiff should seek to use more water from Rocky Creek than is reasonably necessary, and shall waste it by running it over his dam, the defendant by proper proceedings can have the extent of the easement more accurately measured and defined, unless the parties by themselves, or by friendly arbitration, shall agree upon what is an adequate but not excessive enjoyment of the easement, which they should be able to do, now that the legal questions involved are determined.

No error.

THE SECURITY LIFE AND ANNUITY COMPANY v. GEORGE H. COSTNER.

(Filed 2 December, 1908).

1. Insurance—Contracts, Valid and Invalid—Severable.

A valid contract or policy of life insurance is severable from an invalid collateral agreement made at one and the same time, respecting a benefit prohibited by statute.

2. Same—When Enforcible.

When two contracts are made at one and the same time respecting a contract or policy of life insurance, one valid and the other invalid, the valid contract is enforcible if severable from the invalid one.

3. Same—Rebates.

A contract or policy of life insurance regularly issued and valid, is not affected by a collateral agreement that the company would deduct certain amounts by way of renewal commissions as credits on the premium; and a defense to the payment of a note given for the premiums is untenable, that the policy and note are void for reason that the special benefits or rebates were given to certain persons, and not all, of the "same class and expectation of life." Revisal, sec. 4775. Whether the collateral agreement in this case is violative of the statute, *quaere*.

4. Same—Consideration—Advantages Received.

When the insured has given his note for the premiums on his life insurance policy, and has received for one year, in this manner, the benefits of the insurance, he cannot avoid paying his note upon the ground of his having collaterally contracted with the company for deduction of certain amounts by way of renewal commissions in violation of the provisions of Revisal, 4775.

ACTION tried before *Moore, J.*, and a jury, April Term, 1908, of LINCOLN.

Defendant executed his promissory note for $144.10 payable to A. E. Scarborough, being the amount of premium on three policies of insurance aggregating $5,000, issued by plaintiff company on the life of defendant. The note was transferred to plaintiff, before maturity, by Scarborough, who was its agent for the purpose of soliciting insurance policies. Defendant admitted the execution of the note and alleged, by way of defence, that, at the time the policies were issued, and as an inducement to him to take them, plaintiff executed and delivered to him a contract in the following words: "The Security Life and Annuity Company, in consideration of his influence and good will in promoting and maintaining its business in the State of North Carolina, through its authorized agents, and by recommending to them suitable persons for insurance, and aiding them to secure at least two applications, on which $5,000 contracts are issued by this Company, employs George Henry Costner, of Lincolnton, N. C., as one of not exceeding 600 persons, who shall receive as compensation for such services, a renewal commission according to the following terms and conditions, to-wit:

Said Company agrees, at the end of each calendar year, it will credit the said George Henry Costner, with his pro rata share of a special renewal commission fund (to be created from the expense element of its premiums) according to the number of the said 600 persons whose contracts remain in force, said special renewal commission fund to be made up of $........ set aside annually for such purpose, for every contract in force, written in the State of North Carolina, for ten years from 1 September, 1901, on which there has been paid during the preceding twelve months one annual, two semi-annual or four quarter-annual premiums, and so long as such premiums are paid.

On every anniversary of the date of this contract, after the second, the amount so credited as above to be deducted from the annual premium on said George Henry Costner's policy, and any excess to be paid said George Henry Costner in cash, said compensation being for no other consideration than as mentioned above. In the event of lapse of the $5,000 contract on his own life, or failure to perform the services herein defined, this contract shall terminate."

This contract was signed by plaintiff's president and delivered with the policy by Scarborough. Defendant testified that he was induced to take the insurance by reason of the execution of the contract. That he ascertained, in a short time thereafter, that the contract was illegal. He retained the policies and refused to pay the note—has never paid any premiums on them. He contended that the contract was violative of the provisions of sec. 4775 of the Revisal and invalidated the note given by him. He requested his Honor to so instruct the jury, which was declined, and defendant excepted. The jury found that the contract was executed and delivered at the same time that the policies issued, and, under instructions of the Court, found that defendant was indebted to plaintiff, etc. Judgment and appeal.

A. L. Quickell for plaintiff.
C. E. Childs for defendant.

CONNOR, J., after stating the facts: The sole question presented is, whether by reason of the provisions of sec. 4775, Revisal, forbidding insurance companies from giving any special benefits, or any rebate of premiums on policies to one person not given to all others of the "same class and expectation of life," the entire contract, policy and note are void. Conceding that the contract, set out in the record, violates the provisions of the statute, it does not follow that the policy of insurance issued, or the note given for premiums are void. It is not always easy to distinguish between those cases in which the illegal element enters into and so permeates the entire contract as to render it void, and those in which two covenants or obligations are assumed which are either severable, or which the parties have so severed that the valid may be separated from the invalid, and enforced. Pollock thus states the law: "A lawful promise, made for a lawful consideration, is not invalid by reason only of an unlawful promise being made at the same time and for the same consideration." Again: "Where a transaction, partly valid and partly not, is deliberately separated by the parties into two agreements, one expressing the valid and the other the invalid part, then a party who is called upon to perform his part of that agreement which is, on the face of it, invalid, cannot be heard to say that the transaction, as a whole, is unlawful and void." Contracts, 482 and 483. In *Price v. Green,* 16 M. & W. (Exch.) 346, the defendant, for one consideration, covenanted not to engage in trade in the cities of London and Westminster, or within 600 miles of either of said cities. The action was for breach of the first covenant. *Patterson, J.* held that the two were divisible, and sustained the action for breach of the valid covenant, saying, "No doubt the covenant formed the consideration for the payment of 1,500 pounds, and possibly Gosnell would not have given so large a sum, unless the prohibition to trade had been as extensive as, by the whole of the covenant, it is made to be; but this is conjecture only . . . . It should be observed that the restriction as to 600 miles from London and Westminster is only void and not illegal." In the same case, reported in 13 M. & W., 695, *Pollock, C. B.*, said: "It is not like a contract to do an illegal act; it is merely a covenant which the law will not enforce; but the party may perform it if he choose."

In *Fishnell v. Gray,* 60 N. J. L. 5, *Beasley, C. J.,* said: "The proposition posited is, that as this part of the consideration of defendant's promise is illegal, the entire contract falls and that no part of it can be enforced." After discussing the question, he says: "As a consideration it was, in the earlier cases, treated as devoid of legal force, but it was deemed to vitiate all other considerations with which it was blended. On this theory an agreement to abstain generally from carrying on a certain business, as in the present case, was treated as though it were an agreement to commit a crime, and, as a consequence, it illegalized everything that it touched. But this view, it has since been perceived, is unnecessarily stringent and is, in fact, quite unreasonable. There is nothing immoral or criminal in a stipulation not to engage in a certain business. A man may bind himself to such an abstention without incurring any legal penalty. The only effect is that such an engagement cannot be enforced, either at law or in equity. And this is the aspect in which it is regarded by modern authorities." The same view is stated by Page in his recent work on Contracts, 1 vol., section 509. "If A. makes a promise to B., consisting of two, or more, covenants, upon a valuable and legal consideration, and one of the covenants made by A. is illegal, and the other is legal, the question of whether the legal covenant can be enforced or not, depends on whether the contract is severable or not. If the contract is severable, consisting in legal effect of distinct contracts, the legal covenant can be enforced." For this statement of the law, the author cites a large number of decided cases.

The distinction is sometimes made between contracts *malum in se* and *malum prohibitum*, but this is not recognized with us. When the statute prohibiting a contract declares it to be void, as in the statute against gambling in "futures", no enforceable promise or obligation can grow out of it. *Burns v. Tomlinson,* 147 N. C., 645. The statute, sec. 4775, does not declare that contracts, made in violation of its provisions, shall be void. There is nothing immoral in the contract made by plaintiff with defendant, and it is not clear that it comes within the statutory prohibition. *Muller v. Ins. Co.,* 60 N. E. Rep., 958. It seems that, for what the company regarded a valuable consideration, it proposed to give to a class of 600 of its policy-holders certain benefits. However this may be, it is manifest that the note was executed for the exact amount of the regular premiums charged all persons of defendant's age for that kind of policy. It would hardly be contended that the policy was void and that, if defendant had died within the year, the company would not have been compelled to pay it. The company, in consideration of the payment of the premium or the execution of the note, made two separate and distinct contracts with defendant, assuming entirely different obligations. One was that, upon the payment of the premiums named in the policy, at stated annual periods during his life, it would, upon his death, pay to the beneficiary named, the amount of the policy. This was a valid, binding contract. At the same time, the company made a separate contract with defendant that, upon the payment of the second annual premium and the one due each year thereafter, it would deduct certain amounts by way of renewal commissions, which should be credited on said premiums. Assuming, for the purpose of this decision, that this contract is void, that is, not enforceable by reason of sec. 4775, Revisal, we are unable to perceive how it can affect the validity of the contract of insurance or the promise to pay the premium. It would be a strange result if a statute, passed to prohibit rebates or commissions being paid to the insured, should invalidate the policies issued to persons who pay the premiums, or invalidate notes given for them.

Defendant says that he learned, in a few days after the policy was issued, that the contract was void, but that he retained it in his safe until the next premium fell due, when he let it lapse. He was certainly insured for one year, and this was a valid and valuable consideration to support his promise to pay the premiums. *Roddey v. Talbott*, 115 N. C., 293. To hold that, upon his own evidence, he may, in the light of the facts in this case, take the consideration and then repudiate his promise to pay, would subject the Court to the charge of violating "the dictates of justice." In *Lindsay v. Smith,* 78 N. C., 328, the contract was to suppress a criminal prosecution and to ditch plaintiff's land, with an express provision that it was not to be of any "binding force" until the prosecution was dismissed. For manifest reasons the Court held that the plaintiff could not recover.

In *Covington v. Threadgill,* 88 N. C., 186, notes were given for the payment of liquor, sold in violation of a statute, which imposed a penalty. While these and other decisions of this Court may be distinguished from this case, it must be conceded that language is used indicating a failure to note the distinction made by more recent decisions. In all of the cases in our reports, the contract was made in violation of a penal statute. In this appeal it will be observed that no commission was to be credited to defendant until after the second premium was paid. He has never paid it, and the company has never come under obligation to him on this contract. We do not attach any importance to the fact that the note was payable to Scarborough and transferred to plaintiff. He was the agent of the company, and it was bound by his acts. There is

No error.

HOKE, J., did not sit.

JAMES R. WOODRIDGE v. M. C. BROWN, Executor, et al.

(Filed 2 December, 1908).

1. **Appeal and Error—Instructions—Verdict, Directing—Exceptions—Broadside Exceptions.**
   A general exception to an instruction for the jury to find for the plaintiff upon the whole evidence is not too indefinite, or defective as a broadside exception.

2. **Pleadings—Contract—Warranty—Counterclaim—Allegations.**
   Evidence tending to show a breach of warranty in a contract for the sale of goods is incompetent when the warranty was not specially pleaded.

3. **Contracts—Warranty—Evidence.**
   The mere facts that the seller of merchandise knew the purpose for which it was purchased, and, at the time, said that the grade would do, and used for the purpose intended, does not constitute a warranty.

4. Same—Quality of Merchandise.

In the absence of warranty of the grade of merchandise sold and delivered, evidence that the merchandise was of inferior quality is inadmissible, though the purchaser could not have ascertained that the quality was inferior except in its use.

5. Same—Instructions.

It is not error in the trial Judge to instruct the jury to find for the plaintiff, upon the whole evidence, in an action upon contract for goods sold and delivered, when the only defense set up was by way of counterclaim for breach of warranty, the defendant having failed to allege and prove a breach of warranty.

ACTION tried before *Moore, J.*, and a jury, May Term, 1908, of CABARRUS.

This action was originally brought against R. A. Brown. After the pleadings were filed, defendant died leaving a last will and testament, and the present defendants, his executors, were made parties. Plaintiff alleged that, between the 1st day of August and the 9th day of October, 1906, he sold and delivered to defendant's testator fourteen car loads of coal at a stipulated price, which defendant's testator promised to pay; that said coal was received and used by defendant's testator. A statement showing amount, date and price of the shipments was made a part of the complaint. Defendant's testator admitted the sale and delivery of the coal and the price thereof. He alleged, by way of defence to plaintiff's demand, that five car loads of the coal "were of such inferior quality and contained so large a per cent. of slate, that, although he made every effort, he could not get the same to burn in such a way as to furnish anything like the necessary amount of heat for this purpose, that of burning brick;" that he did not discover the inferior quality of the coal until he used it; that it was practically worthless for defendant's purpose; that, by reason of its inferior quality, the bricks burned were soft, and that he was damaged to the amount of $500. Plaintiff, by way of reply, denied the matter set up as a defence. The only issue submitted to the jury was: "Are the defendants indebted to the plaintiff and, if so, in what sum?" No warranty of the quality of the coal was alleged, nor was any fraud or concealment charged. Evidence tending to sustain defendant's contention was admitted over plaintiff's objection. At the conclusion of the evidence the record contains this entry: "The evidence taken to show a warranty of the coal, and likewise the evidence taken to show that the coal was worth less than the contract price and of inferior quality, is refused, and the defendants except. Thereupon the defendants withdraw counterclaim and take a nonsuit as to the same." Plaintiff excepts. His Honor instructed the jury: "That the defendants are not entitled to recover any damages from the plaintiff on account of either the freight paid by their testator or the losses which it is alleged that he sustained, on account of the alleged unfitness of the coal for the purpose of burning brick. The defendants do not allege that the plaintiff expressly warranted the quality of the coal, and the law does not imply a warranty of the quality of an article of personal property sold. The defendants having admitted during this trial that their testator ordered the coal, that the contract price was, as stated, in the statement of account annexed to the complaint, that the coal was shipped by the plaintiff to the defendants' testator, the Court charges you, as a matter of law, that the plaintiff is entitled to recover in this action the contract price of the coal, and it is admitted that the contract price of the coal was $562.00, and that this sum bears interest from the 25th day of September, 1907, if it is due at all. Therefore, the Court charges you to answer the issue, 'Are the defendants indebted to plaintiff, and, if so, in what sum?' 'Yes, $562.00, with interest from the 25th day of September, 1906.'" Defendants excepted. Judgment for plaintiff. Defendants appealed, assigning, as error, refusal to admit competent testimony showing a warranty of the coal and that it was worth less than the contract price, and of inferior quality and value; for errors in the charge of the Court.

Montgomery & Crowell for plaintiff.
L. T. Hartsell and *M. B. Stickley* for defendant.

CONNOR, J., after stating the case: Plaintiff insists that the assignment of error, in respect to the charge, is too indefinite, coming within the definition of a "broad side exception" which the Court has uniformly held insufficient. In view of the fact that his Honor instructed the jury to find for the plaintiff upon the whole evidence, we think the exception well taken as to form.

It seems that, upon cross-examination of plaintiff's representative who took the order for the coal, defendants were permitted to show that defendants' testator told him that he was buying the coal to burn brick, and that the witness told him that this grade of coal would do so and that it was used for that purpose. Plaintiff objected, but the testimony was admitted. After the evidence was concluded his Honor struck it out. It was clearly incompetent to show a warranty, because no warranty was alleged in the answer, and for the further reason that, taken as true, it did not show that the quality of the coal was warranted, or that the grade of coal ordered would burn brick. While it is true, as uniformly held, that no specific form of words is necessary to constitute a warranty of soundness, yet there must be evidence that the seller, by some appropriate language, intended to make, and that the buyer understood that a warranty was being given. Again, it is not alleged that there was any fraud or deceit on the part of plaintiff, either in respect to the grade of the coal or its quality; nor did the rejected testimony tend to show any such element in the transaction. We are thus brought to consider the question whether, if alleged and proven, the fact that plaintiff knew the purpose for which the coal was to be used, entitled the defendant to a reduction in the price by reason of its being of an inferior quality. The exact question was presented and decided by this Court in *Dickson v. Jordan,* 33 N. C., 166. The defendants, who were the owners of a ferry, purchased, by order, "seine rope" of plaintiff, informing them that it was to be used at their fishery. The rope sent was of the size and kind known as "seine rope." Defendants used it, but it proved to be of an inferior quality, repeatedly broke in drawing the seine and was unfit for use for fishing purposes. *Pearson, J.,* said: "It is a principle of the common law that no warranty of quality is implied in the sale of goods. *Caveat emptor.* In the absence of fraud, if the article be of bad quality, the purchaser has no redress unless he has taken the precaution to require a warranty." Further discussing the exceptions, he says: "His Honor was of the opinion that, in this case, there were two facts which furnished a sufficient ground for making an exception to the general rule. The plaintiffs knew the purpose for which the rope was intended and it was not present to be judged by the defendants. One, or both, of these facts might have been a very sufficient reason for requiring a warranty . . . . But we do not see how they can furnish a ground for the law to imply a warranty in favor of the defendants, when they neglected to take one for themselves." The learned Justice notes the further fact that the defendants did not have an opportunity to discover the inferior quality of the rope until they had used it and rejects the argument made by counsel that, from this fact, a warranty would be implied. The facts in that case strikingly illustrate the principle applicable here. The decision has been cited with approval. If the defendants had alleged that a grade of coal different from that contracted for had been sent, the plaintiff would have failed in his action upon an express contract for a stipulated price, and, if the coal had been used by defendant, would have been driven to sue as for a *quantum valebat* on the "common count," when defendant would have been entitled to show the real value of the coal. *Waldo v. Halsey,* 48 N. C., 107. In *Guano Co. v. Tillery,* 110 N. C., 29, the plaintiff contracted to sell defendant "Peruvian Guano."

Defendant, not knowing that the article was not so, used it. The Court held that he was only liable for the actual value of the article sold and used. In *Lewis v. Rountree,* 78 N. C., 323, defendant sold plaintiff "strained resin." It turned out that the resin delivered was not "strained," this being a well-known grade of resin in the market. Held, that defendant was liable. When an article is manufactured for a specific purpose, the law will imply a warranty that it is fit for such purpose. *Thomas v. Simpson,* 80 N. C., 4. In *Love v. Miller,* 104 N. C., 582, the contract was to sell cotton to be of "average grade of low middling," etc. Held, a warranty that it would come up to the description. In *Reiger v. Worth,* 130 N. C., 268, the contract was to sell "good seed rice." Held, a warranty. *Critcher v. Porter McNeal Co.,* 135 N. C., 542; *Allen v. Tompkins,* 136 N. C., 208. The only defence set up in this case, and the only one which the testimony tended to show, was that the coal was of inferior quality. This can only be guarded against by a warranty. His Honor therefore correctly rejected the testimony and instructed the jury. We have discussed the defendants' appeal as if the proper allegations were made. In no point of view can the exceptions be sustained. We do not pass on plaintiff's exception to defendants' withdrawal of their counterclaim. It is not presented. There is

No error.

J. F. McCULLOCH et al. v. SOUTHERN RAILWAY CO. et al.

(Filed 2 December, 1908).

1. **Railroads—Lessor and Lessee—Torts of Lessee—Liability of Lessor.**

While a lessor railroad company, having a charter from the State, remains liable for the manner in which its lessee railroad company performs the public duties arising from the use under its charter, it is not liable for the tortious acts of its lessee in carrying on an entirely separate and distinct, though similar, business of its own, and which does not fall within the duties of the lessor road to the public.

2. **Railroads — Pleadings — Lessor and Lessee — Cause of Action Stated—Jurisdiction—Removal of Causes—Federal Courts.**

When the complaint, in a joint suit against a domestic and foreign railroad corporation, alleges that the latter is a lessee of the former, and that its action in taking plaintiff's land for railroad purposes, the subject of the suit, was unjustifiable under the charter granted by the State to its lessor, but was for a separate and distinct part of the lessee's business, no cause of action is alleged as to the lessor company, and the lessee, when the amount demanded is jurisdictional, can, upon proper proceedings, have the cause removed to the Federal Courts.

3. **Same.**

Allegations of the complaint that defendant railroad company, a domestic corporation, which had lawfully acquired the lands in question, had leased its road, and charter rights to operate it, to its co-defendant, a foreign corporation, and that, for its separate and distinct purposes, the latter had imposed an additional and unauthorized burden upon the *locus in quo*, states a cause of action against the latter company alone, and, upon proper proceedings, the cause is removable to the Federal Court, when the amount is jurisdictional.

4. **Railroads—Pleadings—Jurisdiction—Severable Causes—Removal of Causes—Federal Courts—Amendments.**

When, in a suit brought jointly against a domestic and foreign corporation, in the State courts, the complaint alleges a severable cause of action, and an amendment is made to sufficiently increase the amount involved to confer jurisdiction on the Federal Court, upon proper proceedings for removal had by the latter company, the cause is removed *eo instanti* by the force of the statute, and the State courts cannot proceed further, or inquire into the amount of damages plaintiff is legally entitled to recover under the facts stated, or to pass upon the validity of the cause, or permit the amended complaint to be withdrawn.

5. **Railroads—Jurisdiction—Removal of Causes—Federal Courts—Money Demand—Condemnation Proceedings.**

The jurisdiction of the Federal Courts is not affected in a suit wherein the plaintiff claims damages from a foreign corporation, for an additional and alien burden upon his lands; for it is not a question of appropriating property against the owner's will, as in the enforcement of the right to acquire land by condemnation proceedings.

Clark, C. J., dissenting.

Action heard by *Jones, J.,* April Term, 1908, of Guilford, upon petition for removal to the Circuit Court of the United States.

From the judgment of his Honor that the cause was not removable, the Southern Railway Co. appealed.

Scott & McLean, Justice & Broadhurst and *Douglass & Douglass* for plaintiff.

W. B. Rodman and *Wilson & Ferguson* for defendants.

Brown, J. The history of this case is as follows: Action was commenced August 1, 1903. The pleadings were filed and the cause came on for trial at the July Term, 1907, and a judgment was rendered in favor of defendants, dismissing the action. From this judgment, plaintiffs appealed to the Supreme Court, and the appeal was heard at the Fall Term, 1907, upon an agreed state of facts. 146 N. C., 316.

A new trial was awarded, and the court suggested to plaintiff an amendment to the pleadings. The plaintiff, on the first day of April Term, 1908, of the Superior Court of Guilford County, acting in accordance with the suggestion of this Court, filed an amendment to the complaint, and instantly the defendant Southern Railway Co. filed a petition for removal. The Court overruled the motion to remove, and defendant Southern Railway Co. appealed.

The Southern Railway Co. is the lessee of the North Carolina Railroad Co., and, as such, is operating the line of railway extending from Charlotte, through Greensboro, to Goldsboro. As such lessor the North Carolina Company is liable for the acts of the lessee done in the performance of the duties of the lessor as a common carrier. The effect of the franchise to construct and operate a railroad is to require the licensee to perform certain public duties, and the licensee cannot avoid its part of this contract with the sovereign by sub-letting its franchise. The licensee from the State, nevertheless, remains liable for the manner in which its lessee performs these public duties, which the lessor has agreed with the public to perform. *Logan v. R. R.*, 116 N. C., 940. Upon no other principle of law can the decision in the *Logan Case* be sustained. It has never been held by any Court that the lessor of a railroad company is liable for the tortious acts of its lessee, done not while carrying on the business of its lessor, but while carrying on an entirely separate and distinct, though similar business of its own.

The gravamen of the plaintiff's complaint is, that they are the owners and *in possession* of a tract of land on which the Southern Railway has committed a trespass, and that it is undertaking to justify its tortious act under a certain deed to the North Carolina Company, its lessor, and that the trespass of the Southern on this land cannot be justified under that title because the land was not taken to carry on the business of the North Carolina Railroad Company, but for the separate and independent business of the Southern Railway Company. How is the North Carolina Railroad Company interested in an action of trespass against the Southern Railway Company?

It is no more interested than any other grantor under whose deed any alleged trespasser undertakes to justify, and such grantor is admittedly not a necessary or proper party to the action for damages for the supposed trespass.

If this act of taking possession of the *locus in quo* was an act done in the conduct of the public business of the North Carolina Railroad Company, and which the North Carolina Railroad Company was under the law required to do, then, under the former decision in this case, the plaintiffs' action fails entirely and should be dismissed.

The plaintiffs recognize this, and seek to avoid it by expressly alleging in section 11 of the complaint, that the act of taking possession of this *locus in quo* was not done in the conduct of the public business of the North Carolina Company, but for the purpose of conducting a separate and distinct part of the Southern's business.

The former company, according to the complaint, has done nothing. Upon what principle of law then can it be held liable for the acts of the Southern, alleged by the plaintiff to be done outside of and beyond its rights under the lease, it being expressly denied in the complaint that these alleged wrongful acts of the Southern were done in the performance of the public duties which it had undertaken to discharge for the North Carolina Company as its lessee?

A cursory reading of the former opinion in this case will disclose, that the very ground upon which a new trial was awarded is that the Southern Railway Company was doing the acts complained of, not in the performance of the public duties of the North Carolina Railroad Company, but in the performance of the duties of the Southern Railway Company because it owns and operates certain other railroads, and that the acts are done in performance of the public duties of those roads, and plaintiffs' predecessors in title not having granted the land which was taken to be used for that purpose, it was placing an additional servitude on the land, and for this additional servitude the Southern Railway Company should be made to pay.

If this alleged act in entering upon and taking the *locus in quo* may be justified under the charter of the North Carolina Company, and was done in furtherance of its business, then it is lawful, and there is no cause of action against either company. *Sturgeon v. R. R.*, 120 N. C., 225; *R. R. v. Olive*, 142 N. C., 257.

If the appropriation of the property may not be so justified, then only the Southern can be held liable, and in any event the North Carolina Company is not liable upon the facts stated in the complaint.

It is plain that the controversy is not only separable, but that, under the pleadings and the former opinion of this Court, there is only one controversy, and that is between the plaintiffs and the Southern Railway Co. That was the ruling of this Court when it held that the Judge of the Superior Court should have submitted the issues set out in the former opinion on page 319, for those issues present a controversy with the Southern Railway only.

It is suggested that the amended complaint, in which the damages are laid at four thousand dollars, filed in pursuance of our opinion at the last term, does not state a cause of action against the Southern Railway, and therefore the plaintiff would be remitted to his first complaint for $1,500, a sum not within the Federal jurisdiction.

This contention does not appear to find much support in the following clause of that opinion:

"The plaintiffs are entitled in this action to have *permanent* damages assessed, *in the nature* of condemnation, for the additional burden placed upon the lot by its use for purposes other than those for which defendant uses the lot purely as lessee of the North Carolina Railroad Co. (*Hodges v. Tel. Co.*, 133 N. C., 225), in which case this proposition is so clearly and fully reasoned out by Connor, J., with full citation of authorities."

But we are prevented from considering this question because, having held that the controversy is separable and that no cause of action is stated against the North Carolina Railroad Company, when the petition and bond for removal were filed by the Southern Railway Company, the jurisdiction of the State court was at once ousted and that court can proceed no further.

When a money judgment is demanded, as in this case, the right of removal is determined by the sum demanded, as appears by the record at the time the petition is filed. When an amendment is made the sum last demanded is "the matter in dispute." Moon on Rem., sec. 88. After the petition and bond for removal are filed the jurisdiction of the State Court ceases *eo instanti.* It can make no order except that further proceedings be suspended. The plaintiff cannot even take a nonsuit. He must go into the Federal Court to do that. If the State Court has no jurisdiction to allow a nonsuit, how can it take jurisdiction to pass on the validity of a cause of action.

In this case, according to this Court, there are two causes of action attempted to be pleaded. If the controversy is separable, as it is practically admitted to be, it is removable. If then the State jurisdiction ceases when the petition is filed so that a nonsuit could not be taken, whence does the State Court acquire jurisdiction to declare the larger cause of action invalid so as to prevent a removal?

The Federal statute prescribes that when, and as soon as such petition and bond are filed in an action, "it shall then be the duty of the State Court to accept said petition and bond and *proceed* no further in such suit." 24 U. S. Stat. chap. 373, sec. 1. In construing this statute in a case like this, this Court has said: "The intention so expressed is that the jurisdiction of the State Court shall cease at once upon the application sufficiently made for the removal of the action. *The latter in its condition* in all respects at the time must be removed. It is not intended that the State Court shall after that time have control of the action for the purpose of changing its nature or condition, or the form thereof, *or the pleadings therein,* in any respects whatever. It then ceases to have jurisdiction, and has no authority to make any order, decree or judgment in the action. This is settled by many decisions of the United States, several of them much like this case." *Merrimon, C. J.,* in *Winslow v. Collins,* speaking for a unanimous court, including our present Chief Justice, 110 N. C., 121.

If this case involves a seperable controversy, or a single controversy with the Southern Railway Company as is practically admitted and heretofore decided, then this Court has no jurisdiction to pass on the validity of any cause of action set out in the complaint, and could not even allow a nonsuit. Its jurisdiction terminated with the filing of the petition and bond. *Kanouse v. Martin,* 15 How., 198; *R. R. v. Koontz,* 104 U. S., 5; *R. R. v. Dun,* 122 U. S., 513; *S. S. Co. v. Tugman,* 106 U. S., 118; *Kern v. Huidekoper,* 103 U. S., 485; *Marshall v. Holmes,* 141 U. S., 589.

No order of the Superior Court, or of this Court, was essential to the removal, or to put an end to the State jurisdiction. It terminated *eo instanti* by force of the statute. *Stone v. S. C.,* 117 U. S., 214; *Ins. Co. v. Dunn,* 19 Wall, 214.

The plaintiff could not withdraw the amended complaint if he desired, nor could the court allow him to do so. This is held in *Winslow v. Collins, supra,* where it is said: "Hence, also, the order allowing the amendment striking out the second cause of action was unauthorized and without force."

In that case the second cause of action was stricken out in the Superior Court, so as to bring the sum in controversy below the Federal jurisdiction. Dillon on Removal, pp. 66, 68; Foster's Fed. Prac., 385; Moon on Removal, pp. 71, 72, and notes.

The *Tobacco Case,* 144 N. C., 369, was before us upon the question of removal to the Federal Court. This court refused to consider whether the complaint stated a cause of action, saying: "Whether the plaintiff in its complaint has set forth any actionable wrong is not open for us at this time."

The authorities are conclusive, that when at the time the petition and bond are filed, the record as it then stands shows on its face a removable cause, or a separable controversy, which is removable as to one defendant, the State Court has no jurisdiction to make any order whatever, except that it will proceed no further.

We have considered the suggestion that the defendant, the Southern Railway, has no power of condemnation, and, therefore, permanent damages cannot be assessed, so that no cause of action is stated in the amended complaint, and we have shown by controlling authority that after the petition was filed the jurisdiction of the State Court was ousted, and that therefore we are debarred from considering that question. It is again suggested that this is a condemnation proceeding in which the Southern Railway Company is attempting to exercise the power of eminent domain under the laws of this State, and that the United States Courts have no jurisdiction over such proceedings. We will not advert to the apparent inconsistency of the two contentions, but only to the fact that we have practically held, in the former opinion in this case, that this is not a condemnation proceeding but *a civil action* in which the plaintiffs are entitled to damages in the "nature of condemnation."

The Railway Company does not seek to condemn plaintiff's land. That land was conveyed by plaintiffs to the North Carolina Railroad Company by deed, and is within its right-of-way and necessary for the use of that company. The Southern Railway Company could not condemn it if it had the right of eminent domain, as it is already devoted to and necessary for the exercise of the franchise of the North Carolina road. *R. R. v. R. R.,* 83 N. C., 489. The Southern Railway does not claim any right in, or seek to condemn this land, but contends that it does not need to condemn it, as it has the right to use it as lessee of the North Carolina Company.

The plaintiffs only ask for *compensation* for what they aver is an unwarranted use of the land by the Southern Railway Company constituting, in law, a trespass. In our former opinion the contention of plaintiff is stated by the *Chief Justice* with his usual clearness, as follows: "The plaintiffs, in their brief, submit that this is all they wish—*i. e., compensation* for the alien and additional burden, and tersely say 'Take and pay.' If this cause of action is defectively stated, when the case goes back, the pleadings can be amended." 146 N. C., 318.

The whole record and our former opinion clearly show that this is not a condemnation proceeding commenced before the Clerk under the statute, or in the Superior Court in term, in which the railway company is seeking to condemn property under the power of eminent domain, but that it is a civil action commenced in term time, by the plaintiffs, to recover four thousand dollars damages for a trespass.

This is not a "question as to whether property shall be appropriated" under the power of eminent domain against the owner's will, but solely a question as to what compensation shall be paid to the original land owner for an alleged unlawful burden placed on the property by the lessee of the North Carolina Railway Company, to whom the plaintiffs have heretofore conveyed it for railroad purposes.

It is not a question of appropriating property against the owner's will, but simply a question of *compensation,* and where that is the case the Federal Courts always have had jurisdiction even in condemnation proceedings.

Under the Removal Act of 1875, "the question of compensation for land appropriated, if triable in a State Court, might be removed to a United States Circuit Court." Moon on Removal, pp. 136-137. In section 75, quoted *in part* in the opinion of the *Chief Justice,* Mr. Moon goes on to say:

"On the other hand, if all questions that are non-judicial have been determined before going into court, and the court proceeding involves only the judicial question of compensation for the rights taken, the cases holding similar proceedings under the act of 1875 to be within the jurisdiction of the United States Circuit Court are controlling under the present act." P. 139. *Boom Co. v. Patterson*, 98 U. S., 403.

For the reasons given, and upon the authorities cited, we are of opinion that the cause is removable as to the defendant, the Southern Railway Company. The judgment of the Superior Court is

Reversed.

CLARK, C. J., dissenting. This is an action begun against the N. C. R. R. Co. (a North Carolina corporation) and the Southern R. R. Co. (a foreign corporation), the former being lessor and the latter lessee of the former's property. The action was brought to recover $1,200.00 damages for trespass in using the easement in the right of way of lessor company for purposes not covered by the rights acquired by the latter in its capacity as lessee.

This case was here at Fall Term, 1907, 146 N. C., 316. In deciding that any use by the lessee of the property for purposes other than those pertaining to it in that capacity was wrongful, this Court said: "The plaintiffs are entitled in this action to have permanent damages assessed, in the nature of condemnation, for the additional burden placed upon the lot by its use for purposes other than those for which defendant used the lot purely as lessee of the North Carolina Railroad Company. *Hodges v. Tel. Co.*, 133 N. C., 225." That the Court was speaking generally, in the abstract, and not holding that this lessee company possessed the right of condemnation is clear from this further paragraph: "Whether the Southern Railroad Company, not being a North Carolina corporation, can take the property for this additional servitude, under the right of eminent domain * * * * * is a matter not now before us."

When the case went back, the plaintiffs, under leave of court, amended their complaint by adding, among other allegations, that the Southern Railroad Company is a foreign corporation and cannot exercise the right of eminent domain by taking any land under its lease from North Carolina Railroad Company for its own use, or for the use of any other road not an actual or integral part of the North Carolina Railroad, adding, further, that, while insisting that the additional servitude imposed for purposes not incident to its rights as lessee of North Carolina Railroad Company, was "unlawful and tortious and claiming damages for such injuries, the plaintiffs are willing that permanent damages may be assessed in this action for the value of the land," and amended their prayer for judgment by "adding thereto, in the nature of an alternative relief," the sum of $4,000.00 for permanent damages.

The Southern Railroad Company thereupon filed a petition for removal to the Federal Court, averring that this was a severable controversy affecting itself alone. But if the Southern Railway Company does not possess the right of eminent domain, it can not be conferred by the plaintiffs. It can be granted by the sovereign alone, and it follows that the amended complaint and prayer for judgment state no cause of action, and there is before the Court no legal controversy save for $1,200.00 damages for trespass, which is not removable.

In Mills' Eminent Domain, sec. 48, it is said: "The act authorizing condemnation must be express and clear. If there are doubts as to the extent of the power, they should be resolved adverse to the claim of power. *R. R. v. Kip*, 46 N. Y., 546; *Webb v. R. R.*, 4 Myl. and Cr., 116. Although a corporation may be engaged in a great public work, in which the power of condemnation would be of great service, yet the authority must be clearly conferred. Otherwise the corporation must purchase from the owners as best they can. *Thatcher v. Dartmouth Bridge Co.,* 18 Pick., 501." The plaintiffs could have sold to Southern Railroad Company, if the latter were authorized to acquire realty in this State, but the plaintiffs could not authorize or call upon the courts to exercise the sovereign powers of eminent domain in favor of a foreign corporation when the legislature has not conferred that power upon it.

In 1 Lewis' Em. Domain, sec. 242, it is said: "It is solely for the legislature to judge what persons, corporations or other agencies may properly be clothed with this power. *Ash v. Cummings,* 50 N. H., 591." The same author, sec. 243, says, that "such power of eminent domain when conferred by the legislature is a personal trust and cannot be delegated or transferred, except by legislative authority. *Morrison v. Forman,* 177 Ill., 427. Purchasers, grantees, lessees, of the property and franchises of a corporation do not by such purchase, grant or lease acquire the right of eminent domain," citing many cases. To same purport, Randolph Em. Domain, sec 108 and cases cited.

The Southern Railroad Company, being a foreign corporation, with no charter from this State, has had no legislative grant of this power. The general grant, Rev. 2575, is only to corporations created by the authority of this State. The authority conferred on foreign corporations by Rev., secs. 1193, 1194, does not include the right of eminent domain.

The only valid cause of action set out in the complaint is an action for trespass averring $1,500.00 damages.

But if there is a cause of action, it is for a right of condemnation under the State's right of eminent domain which a Federal Court has no jurisdiction to administer; besides, it is not a "suit" within the meaning of the Removal Statute—hence this case is not removable. Moon on Removal, sec.

75, pp. 133, 134, citing *R. R. v. R. R.,* 17 W. Va., 812; *R. R. v. Jones* (*Brewer, J.*), 29 Fed., 193; *Searl v. School Dist.,* 124 U. S., 197. "The appropriation of private property for public use is an act of sovereignty on the part of the State." *Boom Co. v. Patterson,* 98 U. S., 403; *Cherokee Nation v. R. R.,* 33 Fed., 900. "It is not in any proper sense a judicial act." *R. R. v. Dunlap,* 47 Mich., 456; *Navigation Co. v. U. S.,* 148 U. S., 312.

"The question whether property shall be appropriated being solely a non-judicial question to be decided by the State authorities, a proceeding to determine the propriety or necessity, method or extent of any proposed appropriation is not within the original jurisdiction of a United States Circuit Court or removable thereto from a State Court." Moon on Removal, p. 138, citing *R. R. v. Cookroft,* 46 Fed., 881; *R. R. v. Montague,* 94 Fed., 227, and other cases.

D. C. JONES and Husband *v.* W. A. SMITH & COMPANY.

(Filed 2 December, 1908).

1. **Husband and Wife—Estates in Entirety—Right of Survivorship—Timber—Proceeds of Sale.**

   When, after marriage, a husband and wife derive title to land jointly, they are seized of the entirety, that is, *per tout, et non per my*, and neither is entitled to a division thereof by partition proceedings, or of money derived as proceeds of a voluntary sale of timber cut therefrom, as a matter of right.

2. **Same—Married Women—Constitutional Law.**

   The provisions of the Constitution, relating to married women, makes no change in the estate in lands by husband and wife in entirety, or the right of survivorship therein.

ACTION tried before *Ward, J.*, and a jury, October Term, 1908, of WILKES.

The plaintiffs are husband and wife, and were at the time of the transactions hereinafter mentioned. The plaintiff J. M. Jones, the husband, who is only a nominal party to the action, contracted to cut certain timber from a tract of land owned by him and his wife as tenants by entirety and deliver it at the defendant's mill for a price fixed in the contract. The timber was cut and delivered to defendant and he paid for the same. It was agreed by the parties that the timber should be sold and the proceeds of sale should be held subject to the decision in this case. This action was brought by the *feme* plaintiff for a partition of the lumber into which the cut timber had been sawed. The allegation of the petition is that she and the defendant are tenants in common, each owning a one-half interest in the lumber. The petitioner asks for a sale of the property in order that there may be an equal division between the parties. The court suggested that the *feme* plaintiff might amend and sue for her share of the money due for the timber. This she declined to do, but insisted on her right to recover according to the allegations of her petition. The court then intimated that she could not recover, whereupon she submitted to a nonsuit and appealed.

W. W. Barber for plaintiff.
Finley & Hendren for defendants.

WALKER, J., after stating the case: The plaintiffs, as husband and wife, were seized of the land, including the timber, not properly as joint tenants or tenants in common, but as tenants by entirety, for being considered as one person in law they can not take the estate in *moities,* but both are seized of the entirety, that is, *per tout, et non per my,* the consequence of which is that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor. 8 Blk, 182. In 1 Washburn on Real Property (5 Ed.), p. 706, it is said: "A still more peculiar joint estate is that which belongs to a husband and wife, where the same is conveyed to them as such. If a man and woman, tenants in common, marry, they will continue to hold in common. But if the estate is conveyed to them originally as husband and wife, they are neither tenants in common nor properly joint tenants, though having the right of survivorship. but are what are called *tenants by entirety.* While such estates have, like a joint-tenancy, the quality of survivorship, they differ from that in this essential respect, that neither can convey his or her interest so as to affect the right of survivorship in the other. They are not seized, in the eye of the law, of moities, but of entireties. In such cases, the survivor does not take as a new acquisition, but under the original limitation, his estate being simply freed from participation by the other; so that if, for instance, the wife survives and then dies, her heirs would take to the exclusion of the heirs of the husband. Nor can partition be made of the estate." See also 11 Am. and Eng. Enc. (2 Ed.), p. 49; *West v. R. R.,* 140 N. C., 620; *Bynum v. Wicker,* 141 N. C., 95; *Bruce v. Nicholson,* 109 N. C., 204;

2 Kent's Com. 133. The nature, incidents and properties of this estate by entirety were not changed by the provisions of the constitution relating to married women. *Long v. Barnes,* 87 N. C., 329. As the plaintiffs were thus seized of the timber, its severance from the land by cutting it did not convert the estate in the trees, when severed, or in the lumber cut from the logs, into a tenancy in common, nor is the *feme* plaintiff, by reason of the severance, entitled to maintain this action for partition. If she could have enjoined the husband from cutting the timber, under the principle stated in *Bynum v. Wicker, supra,* she is certainly not entitled to have a partition of the lumber, into which the timber had been converted, no more than she would have been entitled to partition of the land or the trees standing or growing thereon. This is the only question before us, as the *feme* plaintiff insisted upon her legal right to partition as alleged and asserted in her petition.

The intimation of the court was correct, and therefore the nonsuit, to which the plaintiff submitted in deference thereto, must stand. It may be that the present state of the law as to married women, under the constitution and statutes and a wise public policy, call for a change in the incidents and properties of this anomalous estate (tenancy by entirety), so that it may be turned into a tenancy in common, but this is a question which addresses itself to the legislature and not to us.

No error.

W. A. KINNEY v. MARY E. KINNEY.

(Filed 9 December, 1908).

1. **Divorce, Knowledge of Grounds of—Pleadings—Issues—Affidavit—Jurisdiction.**
   It is not required by the statute, Revisal, sec. 1563, that the plaintiff allege in the complaint, in an action for divorce, his knowledge of the grounds therefor at least six months prior to its filing, and such matter is not issuable. The Court acquires jurisdiction when the proper affidavit is made.

2. **Divorce—Pleadings—Abandonment—Defense—Proof.**
   In an action for divorce *a vinculo* brought by the husband against the wife, the defense of abandonment, if relied on, should be set up in the answer, as it is not required of the plaintiff to plead and prove that he has not abandoned his wife, under Revisal, sec. 1564.

3. **Divorce—Pleadings—Abandonment, Allegations of.**
   In an action for divorce *a vinculo* brought by the husband against the wife, an allegation in his complaint that the adultery was committed without the husband's procurement and without his knowledge or consent, and that he has not cohabited with her since he discovered her acts of adultery, does not imply his abandonment of her or put that matter at issue.

4. **Divorce—Pleadings—Specific Acts—Issues.**
   In an action for divorce *a vinculo*, an issue as to a specific act of adultery was properly submitted, if raised by the pleadings and germane to the inquiry.

5. **Divorce—Evidence—Specific Act.**
   Testimony of a witness to an act of adultery, not embraced by the issue submitted in an action for divorce *a vinculo*, is competent, when tending to explain the previous relations of the parties.

ACTION tried before *Councill, J.*, and a jury, May Term, 1908, of ROWAN.

This is an action by the plaintiff against the defendant, his wife, for divorce. It is alleged in the complaint that the defendant committed adultery with H. L. Reynolds in February, 1905, in the city of Washington, and in the same month in the city of Richmond, Va., and in February or

March, 1906, in Spencer, N. C. In the seventh section of the complaint, the plaintiff alleged:

"That each and all of said acts of adultery were committed without the consent, connivance, privity or procurement of the plaintiff, and that the plaintiff has not voluntarily cohabited with defendant since the discovery by him of the commission by the defendant of the several acts of adultery complained of."

The defendant filed an answer in which she denied all the allegations of the complaint, except the first and second as to the marriage and the residence of the plaintiff, which were admitted.

The issues and the answers thereto were as follows:

"1. Did plaintiff and defendant intermarry as alleged in the complaint?"

Answer. 'Yes.'

"2. Has plaintiff been a resident of the State of North Carolina for two years next preceding the commencement of this suit?

Answer. 'Yes.'

"3. Did the defendant and H. L. Reynolds commit adultery in the city of Richmond, Va., in February, 1905, as alleged in the complaint?

Answer. 'No.'

"4. Did defendant and H. L. Reynolds commit adultery in Coppel's room in the Wachovia Loan and Trust building in the town of Spencer, N. C., as alleged in the complaint?

Answer. 'Yes.' "

Judgment was rendered upon the verdict for the plaintiff, and defendant appealed.

The defendant tendered the following issues, which the court refused to submit:

"5. Did the plaintiff have the knowledge of the adulteries alleged in the complaint to have been committed the last of February and about the first of March, 1906, for six months prior to the beginning of the suit, or the filing of the complaint?

"6. Did the plaintiff separate himself from the defendant on August 23, 1905, and has he since lived separate and apart from her?"

Defendant excepted. There was evidence that the plaintiff separated from his wife August 23, 1905.

The defendant requested the Court to give the following instructions to the jury:

"1. If the jury believe the evidence of plaintiff, the plaintiff abandoned and separated himself from defendant the 23rd day of August, 1905, and has lived separate and apart from her ever since. There is no evidence as to this fact, except that introduced by the plaintiff, W. A. Kinney.

"2. If the jury believe the evidence of the plaintiff, they should find that he did not have knowledge of the alleged adultery charged to have been committed the last of February and about the first of March, 1906, as charged in the complaint, for six months before the beginning of this action. The action was begun October 10, 1906; the complaint was filed October 11, 1906. It is not enough that he should have had a mere belief or suspicion, but he must have had reasonable knowledge or actual knowledge." The instructions were refused, except as given in the general charge. Defendant excepted.

The Court charged the jury fully upon the issues and evidence. There was no objection to any part of the charge, except the following:

"1. It is the law of this State that if the wife shall commit adultery, the husband is entitled to a divorce, and in a suit brought by the husband against his wife, if it is shown from the evidence, whether circumstantial or otherwise, that is, shown from the evidence, strong, convincing and conclusive, that the wife has committed an act of adultery, this entitles the husband to a divorce. Much has been said during the course of the argument by counsel representing the defendant, as to the effect of a husband abandoning his wife, and after doing so, suing her for divorce upon the ground that she committed an act of adultery after the husband had abandoned her. Whatever the law may be with reference to a condition of this kind, is not a matter for you to consider in answering the issues submitted to you. The Court has seen proper to refuse to submit an issue of abandonment as tendered by the defendant, upon the ground that none such arises upon the pleadings or upon the evidence, and hence, as before stated, you are not to consider whether there was, or was not, an abandonment of the defendant by the plaintiff.

"2. It is further urged before you that the plaintiff did not wait the necessary length of time required by the statute of this State before bringing this suit, and the defendant has tendered an issue as to this view. The Court has declined this issue, as, in the view of the law entertained by the Court, this issue does not arise upon the pleadings or the evidence, and hence you are not to consider this question."

The defendant excepted to the ruling of the Court admitting the testimony of John P. Wingate, as to the act of adultery between Reynolds and the defendant in Hedrick's field, in October, 1905.

The defendant introduced no testimony, and at the close of the testimony introduced by the plaintiff, moved to nonsuit the plaintiff. This motion was denied and defendant excepted.

T. C. Linn and *Burton Craige* for plaintiff.

R. Lee Wright, P. S. Carlton, T. M. Argo and *T. F. Kluttz* for defendant.

WALKER, J. The Court properly refused to submit the issues tendered by the defendant. Whether the plaintiff had knowledge of the adultery in Spencer between his wife and H. L. Reynolds in February or March, 1906, was not an issuable fact in this case. The statute does not require that such knowledge should be alleged in the complaint, but in the affidavit or verification of the pleading. When the proper affidavit is made the Court acquires jurisdiction of the cause. *Hopkins v. Hopkins,* 132 N. C., 22; *Clark v. Clark,* 133 N. C., 28. The pleadings in the action present the issue which should be submitted to a jury.

The other issue tendered by the defendant, if correct in form, was not raised by the pleadings. If the defendant intended to rely on wrongful abandonment by the plaintiff in order to defeat his application for a divorce, she should have alleged it in her answer, and for the same reason that it is necessary to plead condonation or re-crimination for the same purpose. The statute only provides, that in actions for divorce the material facts alleged in the complaint shall be deemed to be denied by the plaintiff, whether actually denied in a pleading or not. Revisal, sec. 1564. This does not mean that the defendant is not required to plead new matter which may, if found to be true, defeat the right to a divorce, and it has been so decided. In *Steel v. Steel,* 104 N. C., at p. 637, this Court held, "that party who asks the Court to grant a divorce from the bonds of matrimony, is not bound to set forth, or prove as a prerequisite to granting the prayer of the petition, the negative averment, that he has not himself been guilty of adultery, or is not in fault. In *Edwards v. Edwards,* 1 Phil. L., 534, Chief Justice Pearson suggests, that if such a 'test oath' were imposed, it might prove good policy, as it would force a petitioner to purge his conscience and probably prevent a great many applications for divorce. The plaintiff is not held bound to anticipate and negative in advance all grounds of defence to the action he brings, and petitions for divorce do not constitute an exception to the general rule," citing *Edwards v. Edwards,* 61 N. C., 534; *Horne v. Horne,* 72 N. C., 530; *Toms v. Fite,* 93 N. C., 274. In *House v. House,* 131 N. C., at p. 143, the present Chief

Justice, referring to the question of abandonment says: "But such conduct is not here pleaded in the answer, nor found by the jury, nor any issue offered, nor any prayers for instruction on that aspect, nor is it clear that the evidence would have justified the submission of such issue, if such matter had been pleaded." See also 14 Cyc. p. 671; *Smith v. Smith,* 4 Paige's Ch. 432; *Jones v. Jones,* 18 N. J., Eq., 33. In *Tew v. Tew,* 80 N. C., 316, it appears from the original transcript filed in this court that the issue, as to the abandonment of the husband, if not raised by the pleadings, was submitted without objection.

We do not think the allegation of the seventh section of the complaint, when properly construed and considered in connection with the denial of it in the answer, raised an issue as to abandonment. There is nothing said about abandonment, but the allegation simply is that the adultery was committed without the husband's procurement and without his knowledge or consent. He might have procured the adultery to be committed or consented to it, even if he had continued to live with his wife. The language used in section seven of the complaint, taken in its ordinary sense, does not imply that he had abandoned his wife, so as to put the matter in issue.

The defendant's objection to the submission of the fourth issue was not well taken. In any view of the case the issue was raised by the pleadings and was proper for the consideration of the jury.

The testimony of the witness, John P. Wingate, as to the act of adultery in Hedrick's field, was competent as tending to explain the previous relations of the parties. *State v. Wheeler,* 104 N. C., 893; *State v. Stubbs,* 108, N. C., 774; *State v. Guest,* 100 N. C., 410; *State v. Raby,* 121 N. C., 682; *Toole v. Toole,* 112 N. C., 152.

There was no error in refusing to give the instructions requested by the defendant, or in overruling the motion to nonsuit. That follows from what we have already said as to the other exceptions, as it is not contended that there was no evidence to support the finding upon the fourth issue. This disposes of all the defendant's exceptions.

No error.

JOHN McNEELY et al. v. CHARLES LAXTON.

(Filed 16 December, 1908).

1. **Deeds and Conveyances—Calls—Boundaries—Parol Evidence.**
   When it is pertinent to the inquiry, in an action for the possession of lands, as tending to establish a call in a deed under which one of the parties to the action claims, it is competent for a witness to testify that he had heard one of the natural boundaries called by the name mentioned in the deed.

2. **Deeds and Conveyances—Burnt and Lost Records—Proceedings—Copies of Deeds—Estoppel.**
   Plaintiff claimed title to the land in controversy by virtue of a deed to his ancestor T. and seven years' adverse possession. Defendant put in evidence the record of proceedings to restore a burnt or lost record, under Code, sec. 56 (Revisal, 328), brought by M., under whom he claimed, against T., to estop plaintiff from denying the location of the boundaries ascertained and declared by the Court therein. *Held,* (1) Plaintiff is not estopped by that record from proving title to the land, or from showing its true boundaries, the copies having only the same force and effect as the lost or destroyed deeds and records would have had, if produced.

3. **Parol Evidence—Record—Harmless Error.**
   Parol evidence of matters contained in a court record, when erroneously excluded, is cured by the subsequent introduction of the record itself.

4. **Deeds and Conveyances—Boundaries—Annexed Plat—Evidence.**
   When the length of a boundary line of land is not given in the conveyance, but is given in an annexed plat, the jury may consider the distance as specified in the plat in locating that line.

5. **Deeds and Conveyances—Boundaries—Evidence—Questions for Jury.**

In an action involving the title to lands, when the controversy is dependent upon the true location of lands described in a certain grant, the jury are not confined, necessarily, in their inquiry, to the location of the lines of other tracts called for in the grant, which are not themselves located. (*Moore v. McClain*, 141 N. C., 479, cited and approved).

6. **Pleadings—Conveyances—Description—Identity.**

When the description of the boundaries of the land in controversy, as set out in the complaint, corresponds with that given in a certain conveyance or grant upon which the plaintiff's right of recovery is made to depend, and a witness has testified as to the identity of a part of the lands, there is some evidence to sustain the plaintiff's right to recover at least a part of the lands described in the complaint.

ACTION tried before *Peebles, J.*, and a jury, August Term, 1907, of BURKE.

This action was brought to recover the possession of one thousand acres of land, and damages for the detention. The real controversy is as to the true location of the land described in a grant to Jacob Anthony. This grant was introduced by the plaintiffs to show title out of the State, and they claimed that by virtue of a deed of Margaret Erwin to their ancestor, H. C. Tate, and seven years' adverse possession, they had acquired title to the land covered by the Anthony grant and the said deed. It is sufficient to set out only the issues and charge of the Court, as the material facts not mentioned in the charge are stated in the opinion of the Court.

"1. Are the plaintiffs the owners of the land described in the complaint, or any part thereof? If so, what part?

Answer: 'Yes,' the land covered by Anthony grant, beginning at W. O. marked T and P running west to black 'Q', thence south to 10 and back to the beginning.

"2. Did the defendant Chas. Laxton wrongfully and unlawfully enter upon said land and commit a trespass thereon?

Answer: 'Yes.'

"3. Did Richard Michaux wrongfully and unlawfully enter upon said land and commit a trespass thereon?

Answer: 'Yes.'

"4. What damages, if any, are plaintiffs entitled to recover of said Laxton?

Answer: 'Five cents'.

"5. What damages, if any, are plaintiffs entitled to recover of said Michaux?

Answer: 'Nothing.'"

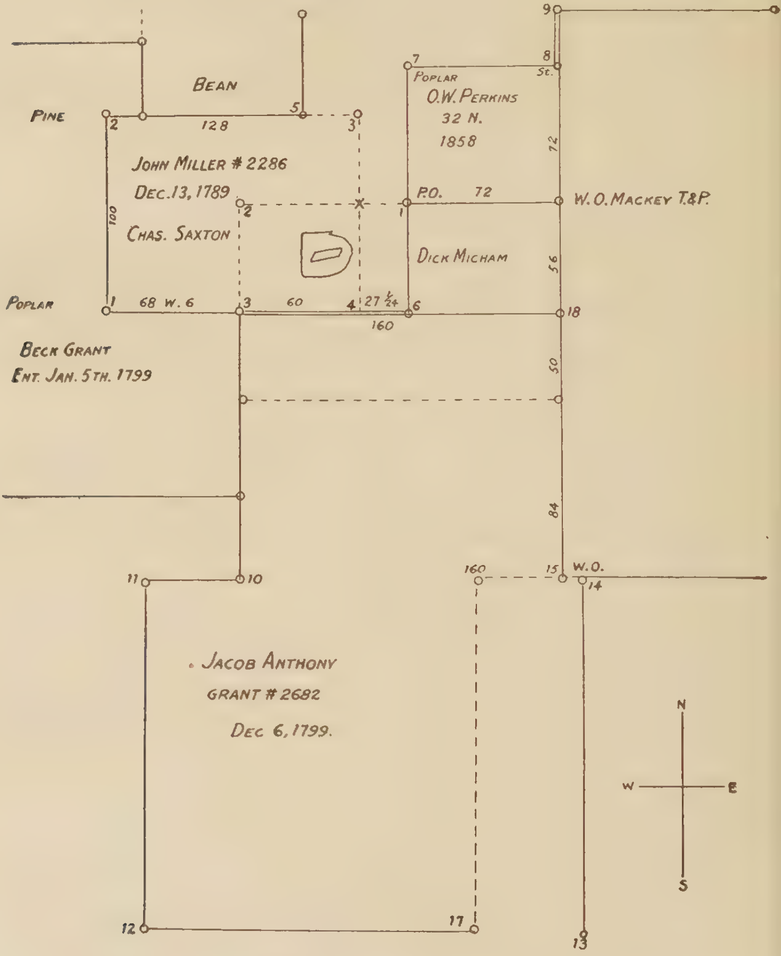
The Court charged the jury as follows, to-wit: The plaintiffs in their complaint claim title to a large tract of land, about 1,000 acres, but they have not introduced any testimony tending to show title to any land except that embraced in the calls of the Jacob Anthony grant of 6 December, 1799.

The plaintiffs must recover, if at all, upon the strength of their own title. For the purpose of showing title out of the State they introduced a grant dated 6 December, 1799, to Jacob Anthony, and then a deed from Margaret Erwin to H. C. Tate, father of plaintiff, dated 1 January, 1853, containing the same metes and bounds as those of the Jacob Anthony grant, and they claim that under said deed they or their ancestor entered into possession of said land and since then (he and they) have been in the open and notorious possession of said land by known and visible metes and bounds, adversely to all the world. Before plaintiff can recover, they must satisfy you by the greater weight of the evidence of the following facts:

1. That they have located the Jacob Anthony grant, and that it is included in the lands described in the complaint.

2. That they and those under whom they claim have been in the open, notorious adverse possession of the land embraced in the Jacob Anthony grant for more than seven years next preceding the commencement of this action, under the deed from Margaret Erwin to H. C. Tate. The possession of a part of the land embraced in the Margaret Erwin deed would

extend to the whole, in the absence of evidence tending to show that someone else possesses any part of said land adversely to the plaintiffs, or their ancestor H. C. Tate.



It is admitted that the Anthony grant and the Margaret Erwin deed cover the same land. In locating the land described in said grant and deed, the natural boundaries called for must, when they can be ascertained and located to your satisfaction, control course and distance. If plaintiffs have failed to satisfy you of the location of any of the natural boundaries called for in said grant or deed, then you should answer the first issue "No." If you are satisfied by the greater weight of the evidence that at figure 15 on the map, a whiteoak, was marked for a corner and, further, that said white oak is the white oak in the Perkins line called for in the grant and Margaret Erwin deed, said grant and said deed being silent as to the distance between the white oak called for and the beginning point, you can consider the distance between these two points as shown by the plat made at the time of the grant. If you find by the greater weight of the evidence that the beginning corner of the Jacob Anthony grant is at "O W O", on the map, and that the calls of the grant go from there west to black 2; thence S. to black 3 and to 10; thence west to 11; thence south to 12; thence east to 13; thence north to 14; thence west to 15; thence north to O. W. O., you will answer the first issue "Yes", the lands covered by the Anthony grant beginning at O. W. O., provided you further find that the plaintiffs were, or their ancestor H. C. Tate was, in the actual, open and notorious possession, for more than seven years next before this action was commenced, of any part of said land. It is true, as claimed by defendants, that the calls, courses and distances laid down on a plat at the same time a grant is made cannot control or vary the calls, courses and distances given in the grant, but where the grant is silent as to the distance between any two natural boundaries called for in the grant, and the distance is laid down on the plat, and you have located one of said natural boundaries, you can consider the distance given on the plat in locating the other natural boundary called for, if it aids you in locating the other natural boundary.

The effect of the burnt or lost record proceeding is to estop plaintiffs from saying that the deeds or records established in the proceeding are not true copies of the lost or burnt deeds and records mentioned therein. These copies have the same force and effect as the lost or destroyed deeds and records would have, were they not lost or destroyed. They do not estop or prevent the plaintiffs from showing, if they can, that they have a better title to any of the lands embraced in said lost deeds than Mrs. Michaux, and those claiming under her.

If you locate the beginning of the Anthony grant at 18, you will answer the first issue "Yes", the lands embraced in the Jacob Anthony grant beginning at 18 on the map. If you locate the beginning corner of the Jacob Anthony grant at "O. W. O.," and you further find that plaintiffs are the owners of the lands covered by the Jacob Anthony grant, then you should answer "Yes" to the issue, "Did Chas. Laxton enter upon said land and commit a trespass thereon." Said Laxton on cross examination said that he had cut and carried away timber trees from said land. If you locate the beginning point of the Jacob Anthony grant at 18, then you should answer this issue "No," because the land Laxton said he cut timber trees on is not included in the Jacob Anthony grant, if its beginning corner is at 18.

The Court recapitulated the contentions of both sides, and at the conclusion of the charge asked if there was anything else either side desired called to the attention of the jury, and both sides were silent. No exception was made on the trial to the contentions of either side as given by the Court, or to the failure of the Court to give other contentions.

The defendants' motion for a new trial was overruled, and judgment entered upon the verdict. Defendants appealed.

S. J. Erwin for plaintiff.

Avery & Erwin and *J. Frank Wooten* for defendant.

WALKER, J., after stating the case: The plaintiffs, for the purpose of establishing the boundaries of the land claimed by them, introduced as a witness J. T. Perkins, who testified that there is a forked branch on the land of H. C. Tate (under whom plaintiffs claim), and that he had heard the upper prong called "Shingle Branch." The defendants objected to this testimony but it was admitted. One of the calls in the grant to Anthony and in the deed of Margaret Erwin to H. C. Tate was for Shingle Branch. What the witness said was some evidence of the true name of the branch. In *Willis v. Quinby,* 31 N. H., 485, similar testimony was held to be admissible, the Court saying: "The only knowledge men generally have of the names of others, is derived from the fact that they hear them so-called. To have heard a man so-called on one occasion, may not be strong evidence, but it seems to us competent." The Court, in *U. S. v. Dodge,* 1 Deady, 186 (25 Fed. Cases, p. 879), held evidence that a house had been called by a certain name to be competent. So in *State v. McAndrews,* 15 R. I., 30, it was said, that "witnesses to prove a name seldom know more than that the person, whose name is in question, answers to the name, or that others call him by it or speak of him as having it." To the same effect is *Horry v. Glover,* 10 S. C., Eq. (2 Hill), 393. The Court in that case says the effect of the testimony does not depend on the credit of the person who made the statement as to the name, but upon the credit of the witness who was examined; then the inference is drawn from that fact, that it cannot be conceived why the (slave) should have been called by the name, if it was not in fact his true name. It cannot be considered, says the Court, as hearsay. The other objections to the oral evidence were not well taken, and they require no special discussion.

The defendants introduced the record of a proceeding brought by Mrs. Susan F. Michaux against H. C. Tate and others under sec. 56 of the Code (Revisal, sec. 328), to set up and establish certain deeds and conveyances to her father John Jerkins, which had been destroyed by fire, the registry thereof having also been destroyed by fire when the court house was burned. The defendants insisted that the effect of this proceeding, in which a judgment in her favor was entered, was to estop the plaintiffs from denying the location of the boundaries as ascertained and declared by the Court therein. It appears from the record of the proceeding that it was brought by Mrs. Michaux under ch. 8 of the Code concerning "Burnt and Lost Records." We are unable to concur in that view. The statute expressly declares (sec. 56) that the proceeding shall have, "as to the persons notified, the effect of a deed for the (land) executed by the person possessed of the same, next before the petitioner." It was necessary to have the land surveyed to ascertain the boundaries as described in the lost instrument, and the judgment in the proceeding can have only the force and effect of the original conveyance if the latter had not been destroyed, but had itself been in evidence. *Waters v. Crabtree,* 105 N. C., 402. This is the legal effect of the proceeding by the very terms of the statute. The boundaries were not established under the Processioning Act. *Parker v. Taylor,* 133 N. C., 103, cited by the defendants' counsel has, therefore, no application to this case.

The exclusion of the evidence of Charles Laxton as to the burning of Mrs. Michaux's papers, if erroneous, was harmless, as the defendants established the fact afterwards by introducing the record of the proceedings between Mrs. Michaux, as plaintiff, and H. C. Tate and others, as defendants.

The Court properly instructed the jury that in determining the length of the line in the calls of the grant, as the length was not stated in the grant but was given in the annexed plat, they might consider the distance as specified in the plat in locating that line. *Cooper v. White,* 46 N. C., 389; *Redmond v. Mullenax,* 113 N. C., 505; *Higdon v. Rice,* 119 N. C., 623.

The defendants' third prayer for instructions, that if the plaintiffs had failed to satisfy the jury as to the location of the lines of other tracts called for in the Anthony grant, they should answer the first issue, "No," was properly refused. The true rule is stated in *Moore v. McClain,* 141 N. C., 479, citing *Redmond v. Stepp,* 100 N. C., 212, as follows: "If only course and distance are given and the beginning is found, the land will be run by course and distance. But when in addition to course and distance, natural objects, marked trees or lines of other tracts are called for, these when shown, will control course and distance and must be reached by a further extension or shortening of the line so as to reach such objects, trees or adjoining tracts. If none such can be found, then the course and distance must be the guide in fixing the boundary. This is the correct view and has, in actions of ejectment and trespass, been so recognized. It would impose upon those claiming, as in this case, under old grants, a heavy burden to require them to find or make search for natural objects or very old lines, before they could make at least a *prima facie* location of such grants." See also *Harry v. Graham,* 18 N. C., 76, where the rule is also clearly stated by *Chief Justice Ruffin.*

The defendant contended that there was no evidence to show that the land granted to Anthony was any part of that described in the complaint. But we think there was some evidence of that fact. The correspondence between the boundaries as set forth in the compaint and those of the Anthony grant, and the testimony of R. J. Hallyburton, was some evidence that at least a part of the land described in the Anthony grant was included within the boundaries stated in the complaint. The witness Hallyburton testified: "If the jury find 3 to be the N. W. corner of the Anthony grant, and run thence to 18, the Anthony grant would not cover any of the land in dispute, but if it is located, as claimed by the plaintiff, it would include fifty-six acres in dispute."

The contentions of the parties as to the true location of the

Anthony grant were clearly stated in the charge to the jury, and the law arising upon the evidence was correctly applied.

The instructions, to which the defendants were entitled, were substantially given by the Court. After a careful consideration of the defendants' exceptions and of the numerous questions presented by them, we have been unable to discover any error in the rulings and charge of the Court.

No error.

JOHN HOLLER and Wife v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 9 December, 1908).

1. **Issues Insufficient—Verdict—Judgment.**
   It is error for the trial Judge to render a judgment upon a verdict on issues submitted by him, and so framed as not to support it.

2. **Telegraph Companies — Parties — Notice — Issues Insufficient — Judgment—Relationship.**
   In a suit against a telegraph company by the wife for damages in negligently transmitting and delivering a message announcing a death, sent to the husband, upon the face of which she does not appear as a party in interest, it is necessary to a judgment for her that an issue be submitted to, and found in her favor by, the jury, as to whether she is beneficially interested therein; and a finding that the relationship between the deceased and plaintiff was that of sister, is not sufficient, as it shows no causal connection between the injury and the negligence complained of.

CLARK, C. J., dissenting, *arguendo.*

ACTION tried before *Councill, J.*, and a jury, February Term, 1908, of IREDELL.

This action was brought by John Holler and wife to recover damages for delay in delivering a telegram. It is alleged in the complaint that Mrs. Hattie Hastings died on

1 January, 1907, at 8 o'clock p. m., and J. D. Rogers, a relative, at 5 o'clock a. m., on 2 January, 1907, requested the defendant's operator at Huntersville, N. C., to send a message to John Holler and wife, who lived at Morrisville, N. C., notifying them of Mrs. Hasting's death, and paid the charges therefor. The operator was told that Mrs. Hastings was a sister of Mrs. Holler. He wrote the message for Rogers and agreed to transmit it, but it was delivered at Morrisville too late for Mrs. Holler to reach Huntersville, or the place of burial, before the funeral, by reason of which she suffered mental anguish and is entitled to recover damages therefor. The message, as written by the operator, was as follows:

"HUNTERSVILLE, N. C., 2 January, 1907.

"To John Holler,

"Care of Bob White, Morrisville, N. C.

"Hattie died at 8 o'clock last night. Bury this afternoon.

"J. D. ROGERS."

The defendant admitted that it had received and transmitted the message as above set forth, but denied the other allegations of the complaint. There was evidence tending to sustain the plaintiff's allegations.

Issues were submitted to the jury, which, with the answers thereto, are as follows:

"1. Did the defendant negligently fail to transmit and deliver the telegram as alleged in the complaint?

Answer: 'Yes.'

"2. Did the sender of the telegram, Rogers, make known to the defendant at Huntersville at the time the telegram was filed for transmission the relationship existing between deceased, Hattie Hastings, and Maggie Holler?

Answer: 'Yes.'

"3. If the said telegram had been delivered without delay, could and would the said Hattie Holler have attended the funeral of Hattie Hastings?

Answer: 'Yes.'

"4. What damage, if any, is plaintiff, Maggie Holler, entitled to recover?

Answer: '$500.00.'"

Exceptions were taken to several of the Court's rulings, but it is not necessary to state but one, which is the exception to the rendition of judgment for the plaintiff, Maggie Holler, upon the verdict. Defendant appealed.

H. P. Grier and *A. L. Starr* for plaintiff.

Armfield & Turner and *Tillett & Guthrie* for defendant.

WALKER, J., after stating the case: Issues must be so framed that, when answered, they will be sufficient to support the judgment. "We are not inadvertent to the long line of decisions laying down the rule that the refusal of the Court to submit an issue tendered by either party cannot be reviewed by this Court unless exception is taken in apt time; nor do we wish to be understood as reversing or modifying it. That rule, when reasonably construed, does not conflict with the one herein laid down. What we now say is, that section 395 of the Code is mandatory, binding equally upon the court and upon counsel; that it is the duty of the judge, either of his own motion or at the suggestion of counsel, to submit such issues as are necessary to settle the material controversies arising in the pleadings, and that, in the absence of such issues or admissions of record equivalent thereto, sufficient to reasonably justify, directly or by clear implication, the judgment rendered therein, this Court will remand the case for a new trial. Under this rule there was error in the rendition of the judgment, and a new trial is therefore ordered." *Tucker v. Satterthwaite,* 120 N. C., 118. That case has since been approved. *Straus v. Wilmington,* 129 N. C., 99; *Hatcher v. Dabbs,* 133 N. C., 239; *Kelly v. Traction Co.,* *ibid*, 418. In *Falkner v. Pilcher*, 137 N. C., 449, the rule was stated thus: "It may be conceded as a general proposition that a party cannot complain because a particular issue was not submitted to the jury unless he tendered it, but the rule is subject to this qualification, that the issues submitted must in themselves be sufficient to dispose of the controversy and to enable the Court to proceed to judgment, for in that respect the duty of the Court to submit issues is mandatory."

It follows that if the issues in this case were not sufficient to warrant the judgment which was rendered, there was error for which a new trial must be awarded. The judgment was rendered in favor of the *feme* plaintiff, Maggie Holler, alone, and the verdict, in our opinion, did not authorize it. There is no finding that Mrs. Holler had any beneficial interest in the message which the law recognizes as sufficient to sustain an action for damages when there has been negligence on the part of the telegraph company in its transmission, which has caused the plaintiff mental anguish and consequent damage. In *Helms v. Telegraph Company*, 143 N. C., 386, *Justice Brown*, for the Court, says: "The right of the sendee to recover of a telegraph company for error or negligence in the transmission or delivery of a telegram is altogether denied in Great Britain. *Playford v. Tel. Co.*, L. R., 4 Q. B., 106. In this country the English doctrine does not generally prevail. Here the weight of authority holds that the sendee may recover in his own name such damage as he may have sustained by reason of negligence when the message was intended for his benefit, and it was apparent on the face of the message or the company had knowledge of it. 2 S. & R. Neg. (5 Ed.), sec. 543; Joyce Elec. Law, sec. 1008; *Frazier v. Tel. Co.*, 67 L. R. A., 320." But we think this case is in principle not unlike *Cranford v. Telegraph Co.*, 138 N. C., 162, in which we said: "There can be no recovery of damages for delay in transmission and delivery, where it does not, in any way, appear that the plaintiff was an intended beneficiary of the message. We could not well hold otherwise without subjecting the defendant to liability for damages alleged to have been sustained by those who are strangers to its contracts, and to whom it owed no duty whatever. The mental anguish suffered by the *feme* plaintiff cannot, under the facts and circumstances of this case, be traced to any wrong committed by the defendant. There is no causal connection between the breach of the duty owed by the defendant to N. P. Cranford and the anguish of his wife, which resulted from her failure to be present at the funeral of her grandchild, and for it, therefore, the law awards no compensation. It is not every one incidentally suffering a loss from the negligence of another who can maintain an action upon that ground. It has been said that there would be no bounds to litigation if the ill effects of the negligence of men may be followed down the chain of results to their final attenuated effect." An analogous doctrine is laid down in *Williams v. Telegraph Co.*, 136 N. C., 82, in which it is said: "The principle uniformly sustained by the cases upon the subject, some of which we have cited, is that, unless the meaning or import of a message is either shown by its terms or is made known by information given to the agent receiving it in behalf of the company for transmission, no damage can be recovered for failure to correctly transmit and deliver it beyond the price paid for the service." We may well add what is so well stated in *Squire v. Telegraph Co.*, 98 Mass., 237, that "a rule of damages which should embrace within its scope all the consequences which might be shown to have resulted from a failure or omission to perform a stipulated duty or service, would be a serious hindrance to the operations of commerce and to the transaction of the common business of life. The effect would be to impose a liability wholly disproportionate to the nature of the act or service which a party has bound himself to perform, and to the compensation paid and received therefor."

Let us apply these principles to the case in hand. The complaint alleges that the message was intended for John Holler and his wife, whereas the message, as sent, was addressed to John Holler alone, and, further, that the operator of the defendant was notified that Mrs. Hastings and Mrs. Holler were sisters. The defendant denies these allegations, except the allegation that the message was addressed to John Holler, and avers, in this connection, that the message so addressed was the only one received and transmitted by it. These allegations and denials raised issuable facts, and there is no finding that, in a legal sense, the message was sent to Mrs. Holler or for her benefit, or that she had any interest in the message which entitles her to recover damages for mental anguish, alleged to have been caused by the negligence of the defendant. The mere fact that she was related to the deceased, even though she was her sister, is not of itself sufficient to impose upon the company any legal duty or obligation to her. The nearness of the relation does not supply the missing link in the chain of causation, for the defendant cannot be said to have caused the alleged injury to her unless, by its contract, it was, in law, obliged to prevent it, or omitted to perform some legal duty to her, which omission was the proximate cause of the injury. If any person who was related to the deceased can sue for damages, even if not mentioned in the message, and without any showing that he is, in a legal sense, a beneficiary of the message, or one to whom the company owed a legal duty, a liability would be imposed "wholly disproportionate to the nature of the act or service" which the company has bound itself to perform, and the aggregate recovery might be almost unlimited; a principle which would lead to such a result cannot be sanctioned by law. Our case in this respect comes directly within the rule we approved in *Cranford v. Telegraph Co., supra.* In that case it appeared that Mrs. Cranford was related to the deceased child, being her grandmother. We held that the relationship alone did not entitle Mrs. Cranford to sue for damages resulting from mental anguish; and we so hold in this case, that the verdict by which the jury find merely that the *feme* plaintiff was related to Mrs. Hastings, being her sister, without also finding that she was the legal beneficiary of the message, is defective and no judgment for the plaintiff can be based thereon.

The plaintiffs allege in the complaint that the defendant undertook to transmit and deliver the message addressed to John Holler, having knowledge that it was intended for the benefit of Holler and his wife, and also that Mrs. Hastings and Mrs. Holler were sisters. It is also alleged that the message which was actually delivered too late (at about one o'clock p. m.) was the one addressed to John Holler. The allegation that the defendant undertook to transmit and deliver the message, addressed to John Holler, is admitted in the answer, and the other allegations are denied. The charge of the Court upon the first issue was confined to the transmission and delivery of the message addressed to John Holler, as will appear from the following instruction:

"So on the first issue, to repeat, if you are satisfied by the greater weight of the evidence that the message, which has been offered in evidence, was delivered to the defendant's agent at Huntersville at six o'clock, or about six o'clock, in the morning, and was not transmitted and delivered to the sendee, John Holler, until 12:34, or about one o'clock, as you may find from the evidence, in the afternoon of the same day, then the Court charges you that the duration of the time which elapsed between the time when the message was delivered to John Holler, or to the person in whose care it was sent, would be unreasonable delay, and in the absence of some explanation, it would be your duty to answer the issue 'yes'; otherwise answer the issue 'no.'"

The first issue, by its very terms, relates to the transmission and delivery of the message, and not to any error in wording it, and the pleadings and case on appeal show that it was so understood by the parties and the Court, and by the jury, if it be necessary to consider anything but the issues themselves and the answers thereto, in order to determine what the verdict is.

It follows that there was error. The verdict must be set aside and a new trial awarded.

New trial.

CLARK, C. J., dissenting: A telegraph company, unlike the postoffice, does not transmit a paper writing. There is no statute which requires a telegram to be written. No rule or custom of the company to require it is shown in this case, and if there had been the company waived it, for it accepted the oral message, without objection. If there had been such rule, it must be shown that the sender had notice of it. *Hendricks v. Tel. Co.,* 126 N. C., 311; *Carland v. Tel. Co.,* 74 Am. St., 394. In fact, a large proportion of telegrams have always been orally delivered to the company for transmission, and this proportion of oral messages has been greatly increased by the use of the telephone by which a large number of messages are now orally delivered to the company. Whether the message is written down by the sender or the company is immaterial, for such writing is merely evidence of what the message was, which the company received for transmission. The transmission itself is not by a process decipherable by the eye, but by the ear only, and is therefore oral, as it were. 1 Joyce Elec., sec. 10. The defendant did not transmit a written message. The message in this case announced the death of *feme* plaintiff's sister and the time the burial would occur. The telegram was received by the defendant at 5:30 a. m. and was not delivered, a few miles away, till 1 p. m.

The evidence is, that Mr. Rogers went to defendant's office and directed the agent to send the message to "*John Holler and wife,*" and the operator said: "*I will write it down and send it as soon as I can get the wires.*"

The jury found on the issues submitted: 1. That the defendant negligently failed to deliver the telegram alleged in the complaint. 2. That the sender made known to the operator, at the time the telegram was given in to be sent, that the deceased and John Holler's wife were sisters. 3. That if the telegram had been delivered without delay, the *feme* plaintiff, Maggie, would have attended her sister's funeral. 4. That the *feme* plaintiff was entitled to recover $500.00.

The general rule is, that messages of sickness or death need not disclose the relationship of the parties, the nature of the message being notice to the company of the necessity for prompt delivery. 2 Joyce Electricity, sec 804, and many cases cited, among them, *Lyne v. Tel. Co.,* 123 N. C., 129; *Sherrill v. Tel. Co.,* 109 N. C., 528; *Laudie v. Tel. Co.,* 124 N. C., 528; *Meadows v. Tel.,* 132 N. C., 40; *Bright v. Tel. Co.,* 132 N. C., 317; *Hunter v. Tel. Co.,* 135 N. C., 458. This Court has held that, if the company desires to know the relationship, the duty is on it to inquire. 2 Joyce Elec., sec. 805; *Bennett v. Tel. Co.,* 128 N. C., 103. But here the jury find as a fact that the defendant was informed of the relationship, and therefore knew who was the beneficiary of the message, even if the operator had not been told to send the message to "John Holler and wife."

Having received the message, orally, without demur, and taken the sender's money for the service, the defendant was bound to execute the contract. It was told that *feme* plaintiff was one of the sendees. For brevity, or by negligence, it failed to put her name in the telegram. It knew, independently, the relationship, and therefore that *feme* plaintiff was the beneficiary of the contract. It negligently delayed 8½ hours to get a death message a distance of 16 miles, with no relay point between. The message could have been conveyed by an ox cart in less time.

The evidence brings the case within *Cranford v. Tel. Co.,* 138 N. C., 162, for that holds that it is sufficient if there are facts and circumstances to give the defendant notice that the plaintiff was either (1) the sendee, or (2) that the message was sent for her benefit. Here there is direct evidence and finding by the jury of both facts.

The jury, having found that the company was notified that the *feme* plaintiff was sister to the deceased, knew that she was the beneficiary of the message (independently of the sender's direction to send to "John Holler and wife"), and hence *Helms v. Tel. Co.*, 143 N. C., 386, does not apply.

It is impossible to see how the sender could do more than to tell the operator to send the message to John Holler and wife, giving notice that said wife was sister to the deceased; for how could the defendant have been more negligent than here, for the operator said, "I will write it down and send it," and then was negligent both by leaving out the words "and wife" and, further, in not starting the telegram for 8½ hours, for the distance being only 16 miles with no relay point, its actual transmission must have been instantaneous. The public are entitled to better treatment than the defendant gave this plaintiff, and the law ought to see that they get it.

L. A. HAUSER v. W. S. MORRISON.

(Filed 9 December, 1908).

In this appeal from the confirmation by the lower Court of the report of the referee, the Supreme Court finds no error, and affirms the judgment.

ACTION heard by *Ferguson, J.*, on exceptions to report of referee, March Term, 1908, of WILKES.

The exceptions of defendant were overruled, the report confirmed, and judgment rendered for plaintiff. Defendant excepted and appealed.

W. W. Barber, O. C. Dancy and *Finley & Hendren* for plaintiff.

Frank D. Hackett for defendant.

PER CURIAM: In a former suit between these parties, it appeared that plaintiff had instituted summory proceedings in ejectment before a Justice of the Peace, claiming that defendant occupied the land in controversy as plaintiff's tenant, and that the right of removal by this method had arisen by reason of default on part of defendant. On appeal to this Court, the plaintiff's proceedings were dismissed on the ground that the contract relation between these parties was not that of landlord and tenant simply, but that the facts established further the relationship of vendor and vendee, requiring the adjustment of equities between them. See 145 N. C., 248. On the entry of this judgment, the plaintiff instituted the present action to recover balance due on the purchase price of the property, and have same declared a lien on the premises, in accordance with the contract relation indicated between them in the former suit. Defendant answered, admitting the relationship, and claiming to have made much larger payments than were stated by plaintiff. The cause was thereupon referred by consent to J. F. Hendren, Esq. He proceeded, upon due notice, to take the testimony offered, and made his report containing his findings of fact and conclusions of law thereon. On exceptions filed, this report was confirmed by the Superior Court Judge, and judgment entered for plaintiff, from which defendant appealed to this Court.

The evidence, which is set out in full, shows that every claim made by defendant has been heard and duly considered, and, after careful examination, we find no error in the report or proceedings to defendant's prejudice, and are of opinion that the judgment entered below should be in all things affirmed.

Affirmed.

J. M. MITCHELL v. W. S. WELBORN et al.

(Filed 9 December, 1908).

1. Deeds and Conveyances—Controlling Calls.

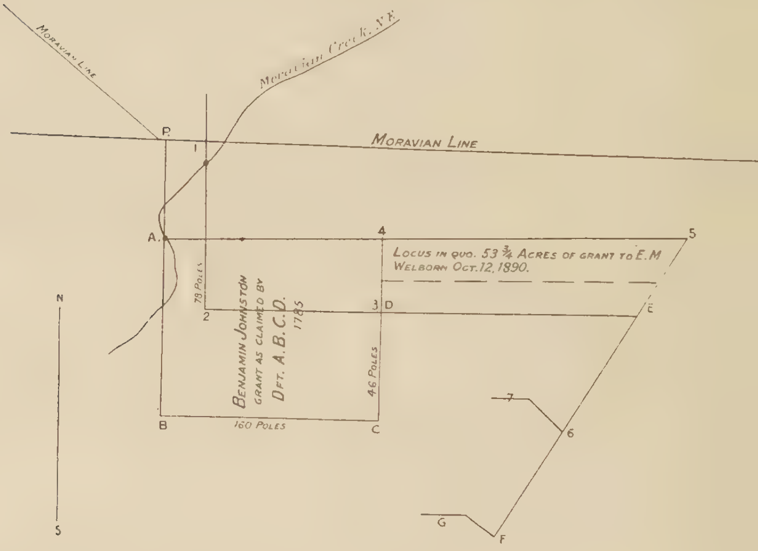
A definite call in a deed or grant for a corner or line of an adjoining tract of land, which is known and established, will control the course and distance, unless it is made to appear that, with a view of making the deed, and by physical survey, a different corner was established, or a different line was actually run and marked, and the instrument was executed by the grantor with the intent, at the time, to convey the land according to this actual survey.

2. Same—Misleading Instructions.

Where the right of the parties depended on the correct location of a grant to J. W., and this grant for its beginning corner called for a W. O. and gum, the beginning corner of grant to Benjamin Johnston, and there was evidence on the part of defendant tending to fix this corner of the Johnston grant at "A," it was reversible error to charge the jury that "they should locate the grant to Benjamin Johnston, if they could, and use the evidence thereon to aid them in locating the James Welborn grant." For if the corner of the Johnston grant, called for as the beginning course of the Welborn grant, was fixed and established its correct location, on the facts presented, would fix and control the location of the beginning corner of the Welborn grant, and the jury should have been so instructed.

ACTION tried before *Ferguson, J.*, and a jury, March Term, 1908, of WILKES.

Plaintiff showed title having its origin in a grant of 600 acres from the State to James Welborn, bearing date 14 November, 1808. Defendant, under a grant, conveying the land in controversy to E. M. Welborn, bearing date 12 October, 1890; and the matters at issue were made to depend, chiefly, on the proper location of the 600 acre grant to James Welborn. The plaintiff claimed, and offered evidence tending to show, that the correct location of this older grant was as indicated on the plat by the figures 1, 2, 3, 4 then east to 5, and then around, according to the course and calls of the grant, to 7, etc. The defendant claimed that the correct location began at A., and as indicated in the plat by the letters A. B. C. D., and then east to E., and so around the course and calls to F. and G., etc. The *locus in quo* was between the lines 4 and 5, and the lines D. and E., so that if plaintiff's claim was established, the James Welborn grant, having its northern line at this point from 4 to 5, would include the *locus in quo*, and the plaintiff would prevail. The portion of the plat considered necessary to an understanding of the case, is hereto annexed, showing also the location of a grant to Benjamin Johnston, bearing date 1779, called for and referred to in the James Welborn grant, and indicated in the map, according to plaintiff's contentions, by the letters A. B. C. 4.



1. Location of James Welborn 600 acre grant, 14 November, 1808, as claimed by plaintiff, beginning at 1, white oak and gum, runs to 2, then to 3, then to 4, then east to 5, and, if correct, includes the *locus in quo.*

2. Location of James Welborn grant, as claimed by defendant, A. B. C. D., then east to E., and, if correct, excludes *locus in quo,* making defendant's grant good.

3. Location of Benjamin Johnston grant, as claimed by defendant, A. B. C. 4.

On issues submitted there was verdict for plaintiff, judgment on verdict, and defendant excepted and appealed.

R. Z. Linney and *L. M. Lyon* for plaintiff.

Finley & Hendren and *Manly & Hendren* for defendant.

HOKE, J., after stating the case: We have given this case most careful consideration, and are of opinion that there should be a new trial of the issues. The decisions of this Court are to the effect that when there is a definite call in a grant or deed for a corner or line of another tract of land, which is known and established, such call will control the course and distance. *Whitaker v. Cover,* 140 N. C., 280; *Dickson v. Wilson,* 82 N. C., 487; *Corn v. McCrary,* 48 N. C., 496. This is certainly true unless it is made to appear that, with a view of making the deed, and by physical survey, a different corner was established, or a different line was actually run and marked, and the instrument was executed by the grantor with the intent, at the time, to convey the land according to this actual survey. *Elliott v. Jefferson,* 133 N. C., 207; *Baxter v. Wilson,* 95 N. C., 137.

And we are of opinion that defendant has not had the benefit of this principle in the trial of the cause, and that reversible error, in this respect, was committed to his prejudice. As heretofore stated, the plaintiff derived title from the 600 acre grant to James Welborn, and his right to recover was made to depend largely on its correct location. The calls of this grant, relevant to the exception we are now considering, are as follows:

"In consideration of money paid into our treasury by James Welborn, we hereby give and grant to him a tract of land containing 600 acres, 'beginning on the corner of a tract of land he bought of Ben. Johnston, a gum and white oak on the bank of the creek, runs south with said line 100 poles to a W. O., then east with said line 160 poles to a pine and B. O., thence N. 46 poles to four oaks and a pine, Ben. Johnston's corner, thence S. 29 to,' " etc.

It seems to have been admitted on the trial, and was assumed in the charge of the Court, that this land "he bought of Ben. Johnston," referred to a tract of land granted to one Benjamin Johnston in 1785, and coincided with it in description set forth in that grant, as follows:

"Beginning at a W. O. and gum on the east side of the creek below the falls, runs thence east 160 poles to a Spanish oak and gum, thence S. 100 poles to a pine and B. O. on a ridge, near Suirlook's path, thence W. 160 poles to a white oak on the hillside, thence N. 100 poles, crossing the creek, and including the Falls as by the plat hereunto annexed doth appear."

Here is a definite call of a corner of the Benjamin Johnston grant as the beginning corner of the Welborn grant, under which plaintiff claims, and an examination and comparison of the two descriptions give indication that this latter grant also calls for at least two of the lines of the Johnston grant, and all, or a portion, of a third line; and there was evidence offered on the part of the defendant tending to fix the corner of the Johnston grant, which was called for as the beginning corner of the Welborn 600 acre grant, at the point on the map indicated by the letter A., some 35 poles south and several poles west of the beginning corner, as claimed by plaintiff and established by the verdict.

In charging the jury on this question, the Court told them:

"It is competent for you to take into consideration the boundary of the grant to Ben. Johnston, the tract called for in the grant to James Welborn, and, if you can do so from the evidence, locate the Ben. Johnston grant, and use to assist you in locating the true line and corners of the James Welborn 600 acre grant, the evidence which you get in regard to the location of the Ben. Johnston grant." So far as we discover, this is all the effect given in the charge to the calls and location of the Benjamin Johnston grant, whereas, the beginning corner of the plaintiff's grant, being definitely described as "a corner of the Benjamin Johnston grant, a gum and white oak on the bank of the creek," coinciding with the Johnston grant in two, at least, of the lines of that grant and perhaps more, a correct application of the authorities cited requires that the jury should have been told that, if the corner and lines of the Johnston grant, called for in plaintiff's grant, were located and established, they would control the location of plaintiff's grant to that extent, and the issues between them should be considered and determined on that principle. This, we think, was not merely an omission waived, by failure to make a specific request for instructions, but, on the facts presented, it was, in effect, a direction to the jury to locate the Johnston grant if they could, and use it, or the evidence bearing on it, to assist them in determining the true location of plaintiff's grant; and the jury were thus improperly given the impression that this was all the effect they were required to give the location or the evidence bearing upon it. It may be that, if the beginning corner of plaintiff's grant should be fixed, as defendant contends, the correct location of the subsequent courses and calls of the plaintiff's grant would place the boundary so as to include the *locus in quo.* There is certainly evidence in the record tending to support such a position, but the location of the beginning corner is directly relevant to the enquiry, and so much so that we think the defendant is entitled to have the question of location submitted to the jury with a correct charge concerning it.

The decision of this Court in *Moore v. McClain,* 141 N. C., 473, in no way conflicts with the disposition we make of the present appeal. That case dealt chiefly with the proper methods and burden imposed upon the claimant in the location of a deed containing descriptions both by course and distance, and also by call for natural objects, and on that question it was held as follows:

"2. When, in addition to course and distance, natural objects, marked trees or lines or other tracts are called for, in a grant or deed, these, when shown, will control course and distance, but the duty is not imposed upon those claiming under such a grant or deed to locate, or make reasonable search for, the natural objects before they can rely upon the calls for course and distance."

And on the question discussed here, to-wit, the effect of the location of natural objects, and the lines of other tracts, when properly established, the opinion quotes with approval from that of *Smith, C. J.,* in *Redmond v. Stepp,* 100 N. C., 217, as follows:

"If only course and distance are given, and the beginning is found, the line will run by course and distance. But when, in addition to course and distance, natural objects, marked trees or lines of other tracts are called for, these, when shown, will control course and distance, and must be reached by a further extension, or shortening of the line, so as to reach such objects, trees, or adjoining tracts. If none such can be found, then the course and distance must be the guide in fixing the boundary."

For the error indicated, the defendant is entitled to a new trial of the cause, and it is so ordered.

New trial.

W. R. COOPER and Wife v. W. H. ROWLAND et al.

(Filed 9 December, 1908).

Appeal and Error—Evidence—Nonsuit—Trial—Per Curiam Not to Prejudice Rights.

In this case, the Court held that there was sufficient evidence to go to the jury, and that a judgment as of nonsuit, upon the evidence should not have been allowed. The evidence was not discussed, as such might prejudice one or the other of the parties to the litigation upon the new trial granted.

ACTION tried before *Webb, J.,* and a jury, March Term, 1908, of DURHAM. Plaintiff appealed.

Manning & Foushee for plaintiff.
Guthrie & Guthrie for defendant.

PER CURIAM. On 20 September, 1892, W. H. Rowland and his wife, Virginia C. Rowland, executed a deed of trust on a certain lot in Durham belonging to W. H. Rowland, to secure the debts owing by him, and therein described. Afterwards the Morehead Banking Company recovered a judgment against W. R. Cooper and W. H. Rowland for $4,000, which was reduced by payment to about $3,000. The judgment was duly docketed and constituted a lien upon the real estate of the defendants. Mrs. Rowland became the owner of the debt secured by the deed of trust, and Mrs. Nannie E. Cooper, wife of W. R. Cooper, became the owner of the said judgment.

This action was brought W. R. Cooper and wife against W. H. Rowland and wife to declare Mrs. Rowland a trustee of the lot conveyed by the deed of trust, for the benefit of Mrs. Cooper, to the extent that the latter had advanced money to buy the judgment of the bank against Cooper and Rowland, Mrs. Rowland having purchased the said lot at a sale thereof under the power contained in the deed of trust, which sale the plaintiffs allege was made at the request of the defendants and is invalid as against the plaintiff, Mrs. Cooper, by reason of the manner in which it was advertised and conducted. The plaintiffs also prayed for a re-sale of the lot by a Commissioner of the Court. Mrs. Rowland died pending the action, and her heirs were made parties.

After hearing the evidence, the Court, on motion of the defendants' counsel, dismissed the action under the statute, and the plaintiffs appealed.

It would be useless for us to state the evidence in the case and discuss it with regard to its legal bearing upon the issues made by the pleadings, as such a course might prejudice one or the other of the parties at the next trial. We have examined the case carefully, and our opinion is that there was sufficient evidence to carry the case to the jury, and the Court therefore erred in ordering a nonsuit. It is best that we defer any further consideration of the case until the jury have passed upon it under proper instructions from the Court, that is, if it should again come before us.

New trial.

E. S. SHELBY VINEGAR CO. v. C. L. HAWN & SON.

(Filed 9 December, 1908).

1. **Spirituous Liquors—Sale in Prohibited Territory—Action Upon Contract—Doctrine, In Pari Delicto.**

   An action on account of sale of cider brought by the successor in business of the vendor firm, cannot be maintained, when it is established that the cider sold was intoxicating, that this was known to the parties and prohibited by law. Under the doctrine of *in pari delicto*, the parties are left *in statu quo*.

2. **Spirituous Liquors — Sale in Prohibited Territory — License — Evidence.**

   When there is evidence that cider sold was intoxicating, the sale of which was prohibited by law, it may be shown as an admission, or *quasi* admission, of plaintiff, that it took out United States license to sell intoxicating liquors.

3. **Spirituous Liquors—Sale and Contract in Prohibited Territory—Interstate Shipment.**

   A contract of sale of spirituous liquors, made in this State, to be delivered in prohibited territory here, is illegal, and cannot be enforced though shipped from another State.

4. **Same—Issues—Instructions.**

   Upon proper pleading and evidence, it was not error for the lower court to instruct the jury, that whether the contract of sale of spirituous liquors was made here in prohibited territory, and whether by its terms the delivery was made here, were issues of fact, in an action on contract of sale of such liquors shipped here from another State.

WALKER and CONNOR, JJ., dissenting.

ACTION tried before *Ferguson, J.*, and a jury, February Term, 1908. Plaintiff appealed.

W. A. Self and *A. A. Whitener* for plaintiff.
Hufham & Whitener for defendant.

CLARK, C. J. This is an action on an account for sale of cider. It is found by the jury that the plaintiff's predecessor, or assignor, contracted in Hickory, N. C., for the sale of cider to be delivered in that town, that the cider sold was intoxicating, and that plaintiff's predecessor knew that the sale of intoxicating liquor was prohibited in Hickory by the laws of the State at the time of such contract of sale, and of the delivery. The Court, upon these findings entered judgment against plaintiff for costs, on the ground that "the plaintiff cannot maintain an action for goods, the sale of which was prohibited by the laws of the State." The plaintiff excepted to the judgment, also to the admission in evidence of the plaintiff having United States license to sell intoxicating liquor.

The plaintiff's predecessor, or assignor, was engaged in the business of selling this cider. There was evidence that it was intoxicating. It was competent to show, as an admission, or *quasi-admission* by the plaintiff, that the cider was intoxicating, that it took out United States license to sell intoxicating liquors. This has been fully discussed and decided in *State v. Dowdy,* 145 N. C. 432.

The exception to the charge upon the fourth issue is without merit. The Court simply instructed the jury that it was an issue of fact to be decided by them, whether the contract of sale was made in Hickory, and whether by its terms, delivery was to be made in that town. The jury found that the contract was made in Hickory, that it was agreed that the delivery was to be made there, and that delivery was in fact made there. This made the transaction illegal. *State v. Johnston,* 139 N. C., 640; *State v. Herring,* 145 N. C., 418. This is not a case where a drummer here took an order for liquor to be shipped in from another State, as was alleged in *State v. Hanner,* 143 N. C., 632.

There is no prayer for instruction raising that point, but, if there was, the contract being made in Hickory to deliver there would make this an illegal contract, and the courts will not lend their aid to collect an account based on such contract. If the liquor was shipped in from another State, that was simply the method the plaintiff took to procure it for his purposes. The delivery to defendant was agreed to be made in Hickory, and was so made. The plaintiff cannot violate the law by an illegal contract and then ask the courts to help it to enforce such contract.

When, as here, the parties are *in pari delicto,* the courts will help neither. If the money has been paid, it cannot be recovered back unless the statute so provides (as in regard to usury, Revisal, 1951), and if not paid, the courts will not aid collection. It will leave the parties to their own devices. *King v. Winants,* 71 N. C., 469; *Griffin v. Hasty,* 94 N. C., 438; *Basket v. Moss,* 115 N. C., 448; *McNeill v. R. R.,* 135 N. C., 733; *Oscanyan v. Arms Co.,* 103 U. S., 261 (which says, "Even if the invalidity of the contract be not specially pleaded"); *Ewell v. Daggs,* 108 U. S., 146.

The law will not lend its aid where the contract "appears to have been entered into by both the contracting parties for the express purpose of carrying into effect that which is prohibited by law." Broom's Legal Maxims, 108. The Oklahoma court neatly sums up the doctrine thus: *"The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation." Kelly v. Courter,* 1 Okla., 277.

No error.

WALKER and CONNOR, JJ., dissenting.

MRS. M. E. FORTUNE v. HAL. HUNT et al.

(Filed 9 December, 1908).

1. **Deeds and Conveyances—Delivery to Third Party—Conditional Delivery—Presumption—Evidence—Rebuttal.**

   The execution and delivery of a deed by the maker to a third person must be accompanied by unqualified instruction to deliver, to make such delivery effectual; and when the testimony of the subscribing and only witness tends but to show that the maker signed the deed, and gave it to a third person with instruction to deliver it to the proper person if he never called for it, and that it was not delivered to the grantee in the lifetime of the maker, the presumption of delivery from the unexplained possession of the grantee and its registration is rebutted.

2. **Deeds and Conveyances—Delivery to Third Party—Conditional Delivery—Death—Revocation.**

   When the maker of a deed gives it to a third person to deliver, but qualifies his instructions so as to retain control over it, and dies while this condition exists, in law his death revokes the authority thus given; otherwise, when the delivery is complete in grantor's lifetime, for then it relates back to the time of its delivery to the third person.

3. **Deeds and Conveyances—Delivery Essential—Intent.**

   The actual delivery is essential in law to the validity of a deed, and in its absence the intention of the grantor will not be considered.

4. **Deeds and Conveyances—Delivered to Third Party—Presumptive Delivery — Evidence — Burden of Proof — Verdict Directing—Questions for Jury.**

   The presumption is that a deed duly proven was executed and delivered at the time it bears date. The burden of proof is upon the party seeking to attack its validity to show the contrary. Therefore, the Court erred in directing a verdict, but should have submitted the issue to the jury with appropriate instruction.

PARTITION PROCEEDINGS, tried by *Ward, J.*, and a jury, April Term, 1908, of RUTHERFORD, upon issues joined in the pleadings before the Clerk.

The plaintiff claimed under a deed alleged to have been executed and delivered to William Hunt, Sr., and introduced evidence to establish her contention. The defendant introduced no evidence.

Under the direction of the Court the jury found for plaintiff. From the judgment rendered the defendants appealed, assigning three errors.

Gallert & Carson for defendants.
Plaintiff not represented in this Court.

BROWN, J. It is stated in the brief of the learned counsel for defendants, that if his Honor was correct in holding that, upon the entire evidence in any view of it, there was no delivery of the deed of 21 September, 1870, from William Hunt, Sr., and wife to Elizabeth Hunt, then the judgment of the Superior Court should be affirmed. We think his Honor did err in directing a verdict upon that issue.

The deed in question was signed by William Hunt, Sr., on 21 September, 1870, who died three or four days thereafter. It was probated 1 January, 1891, and registered in August, 1906. The witnesses to the deed are J. T. Mode and his father, W. G. Mode, who is dead.

The facts as testified to by the witness to the deed, J. T. Mode, are, that the deed was signed by William Hunt, Sr., three or four days before his death, that it was not delivered, although some of the children were present. William Hunt, Sr., signed the deed, and the witness further testifies, "and after he had done so he told my father to take it up and keep it, and if he never called for it, to deliver it to the proper person; my father carried it home, and filed it away at his own house; it was not turned over to any of the grantees in the lifetime of William Hunt, Sr.; I saw it in my father's possession; do not know how defendants came in possession of it. Mrs. Elizabeth Hunt was there when the deed was signed; W. W. Hunt, Sr., signed several deeds at the same time, and he said to my father, W. G. Mode, to take the deeds, and if he did not call for them for him to deliver them to the proper parties;" J. M. Mode also testified that the deed was in the possession of his father, W. G. Mode, after William Hunt, Sr.'s death.

We concede that when the maker of a deed delivers it to some third party for the grantee, parting with the possession of it, without any condition or any direction to hold it for him, and without in some way reserving the right to repossess it, the delivery is complete and the title passes at once, although the grantee may be ignorant of the facts, and no subsequent act of the grantor or any one else can defeat the effect of such delivery. *Phillips v. Houston*, 50 N. C., 302; *Robbins v. Rascoe,* 120 N. C., 79.

The above cases and the others cited by the learned counsel for defendants sustain that proposition.

But in the case under consideration there is no acknowledgment of execution by the grantor. The execution is proven by the witness to the deed after the grantor's death, and that witness testifies now to facts which completely rebut any presumption of delivery. If the facts testified to by the witness be true, the grantor retained control of his deed and had the right to repossess himself of it at any time. There was never a delivery to the grantee, nor to anyone for her during the grantor's life. *Baldwin v. Maultsby*, 27 N. C., 505.

We differ with the learned counsel for defendants that the intention of William Hunt, Sr., is in any way involved. The delivery of a deed, a transmutation of the possession, is an essential ceremony to the complete execution of it, and if William Hunt, Sr., had delivered the paper writing to W. G. Mode with an unqualified instruction that it should be delivered to the grantee after the death of the grantor it would have been a good deed from the time of delivery to the witness.

But the grantor did not deliver the paper with such unqualified direction. He retained control of it and the parol authority, given to W. G. Mode, was in law revoked by the death of Hunt.

It is contended that although there was no actual delivery or parting with the control of the paper, yet it was operative as a deed if the grantor *intended* it should be good as such.

This position is inconsistent with the very definition of a deed, which is a writing sealed and delivered. The intention of the grantor will not take the place of actual delivery, which is essential in law to the validity of a deed. As said in *Baldwin v. Maultsby, supra,* "such an intention cannot overthrow the law."

It is set forth in the text books and adjudicated cases generally, that where the grantor executes a deed and places it in the hands of a third person with instructions to have it delivered and recorded in case of the grantor's death, but to retain it subject to the grantor's control until his death, and the bailee held the deed until after the grantor's death and then delivered it, there is no valid delivery. *Baldwin v. Maultsby, supra;* 2 Jones Law of Real Property, sec. 1312; 1 Devlin on Deeds, sec. 279; *Brown v. Brown,* 66 Me., 316; *Shurtleff v. Francis,* 118 Mass.; *Jones v. Jones,* 6 Conn., 111; *Lang v. Smith,* 37 W. Va., 725. So long as a deed is within the control and subject to the authority of the grantor there is no delivery, without which there can be no deed. But where the delivery to the third party is complete during the grantor's life and the instrument passes beyond the grantor's control by his act, but the time the instrument is to take effect is postponed until the grantor's death, and when he dies the third party delivers the deed to the grantee, it is a valid delivery, and the title passes with it. 1 Devlin, sec. 279, and cases cited. The delivery then relates back to the time when the grantor delivered it to the third party.

We think, however, that his Honor erred in *directing* the jury to answer the first issue "No." After instructing them upon the law bearing upon the issue, the Court might well have instructed the jury that if they found the facts to be as testified to by the witness Mode, there was no delivery of the deed, and that they should answer 1st issue, "No." The defendants had the right to have the jury pass on the credibility of such witness who was introduced by plaintiff.

The value and weight to be given to this testimony is peculiarly within the jury's province. His Honor should have told the jury that the law presumes that this deed, proved, registered and offered in evidence by the defendants, claiming under it, was executed and delivered at the time it bears date, unless the contrary be shown, and that the burden to show it rests upon this plaintiff. *Meadows v. Cozart*, 76 N. C., 450; *Kendrick v. Dellinger*, 117 N. C., 492; *Lyerly v. Wheeler*, 34 N. C., 291. Whenever the rules of evidence give to testimony the artificial weight of a presumption, the question whether such presumption is rebutted by parol evidence, introduced for the purpose, must go to the jury, unless the truth of such rebutting testimony is admitted. *Vaughan v. Parker*, 112 N. C., 96; *Kendrick v. Dellinger, supra.*

If the facts testified to by the witnesses, as set out in the record, be true, then the presumption that the deed was delivered is rebutted, but his Honor had no right to pass on the credibility of their testimony.

For such error there must be a

New trial.

NANCY J. CHATHAM et al. v. L. W. LANSFORD.

(Filed 9 December, 1908).

1. **Deeds and Conveyances — Grantor in Possession — Subsequent Deed—Adverse Possession.**

   A grantor in a deed may afterwards acquire title to the land therein conveyed by purchase or adverse possession, good against his grantee and those claiming under him.

2. **Deeds and Conveyances — Grantor in Possession — Subsequent Deed—Color of Title—Adverse Possession.**

   When a grantor of a deed remaining in possession subsequently purchases from another the land described therein, and takes a deed therefor to himself, the second deed is color of title which open, notorious, continuous adverse possession may ripen into a perfect title against all persons not under disability.

3. **Same—Entry and Ouster—Estoppel—Adverse Possession.**

   Every entry on land is presumed to be under such title as the party thus in possession holds; and when a grantor in a warranty deed remains in possession of lands, afterwards purchases the same from a third person, takes deed therefor to himself, and claims the right of possession thereunder, the fact of his thus taking the deed amounts to an entry and ouster, and he is not estopped from asserting title by adverse possession because of the covenant of warranty in his deed.

ACTION in ejectment, tried before *Ferguson, J.*, and a jury, May Special Term, 1908, of WILKES, for the recovery of a tract of land.

At the close of the testimony, upon an intimation from the Judge as to how he would charge the jury upon a matter vital to the plaintiffs' cause of action, they submitted to a nonsuit and appealed. The facts are stated in the opinion of the Court.

O. C. Dancy, R. Z. Linney and *J. B. Connelly* for plaintiffs.

W. W. Barber and *Finley & Hendren* for defendant.

BROWN, J. The plaintiffs claim under a deed from Noah Brown to Clarey Bicknell, dated 5 February, 1869, and by descent from her. The defendant claims under a deed executed by Larkin J. Bicknell to Noah Brown, dated 16 July, 1870. There is evidence tending to prove that Noah Brown went into possession of the land in controversy in 1870, under his deed from Larkin J. Bicknell, and remained in possession up to the time of his death, about 1886; that his widow then continued in possession, under the will of Noah Brown, devising to her a life-estate, or an estate during her widowhood, up to the time of her death, some few years ago; that Lindsay Jarvis, administrator *c. t. a.* of Noah Brown, went into possession upon the death of the widow and remained in possession until he sold it as administrator to the defendant, who has been in actual possession ever since, claiming it as his property.

At the close of the testimony, his Honor stated that he would charge the jury that, "if they should find from the evidence that in 1870 Noah Brown took a deed of conveyance from Larkin J. Bicknell, and on receipt of the deed went into possession of the lands under the deed, and remained in possession until the time of his death; and further find that Noah Brown by his will devised the lands to his widow during her widowhood, and she remained in possession under the will until her death, and after her death Lindsay Jarvis, as administrator with the will annexed, took charge and possession of the land, and sold it to the defendant, and the defendant has been in possession to the commencement of this action, he would instruct the jury to answer the first issue, 'No.' "

Upon this intimation from the Court the plaintiffs submitted to a nonsuit and appealed.

It is contended that Noah Brown, having executed a deed with covenants of warranty to plaintiffs' ancestress, Clarey Bicknell, is estopped from setting up his after acquired title, and that those claiming under him are likewise estopped.

This contention, we think, is based upon a misconception of the character of the title the defendant claims under.

Notwithstanding his prior deed with warranty, Noah Brown could acquire title to this land by purchase from Clarey Bicknell or from those claiming under her; or he could after such conveyance acquire title against her and those claiming under her by adverse possession.

One of the recognized methods of acquiring title to land is by open, notorious, continuous adverse possession, under color of title. *Mobley v. Griffin,* 104 N. C., 115; *Isler v. Dewey,* 84 N. C., 345.

The deed from Larkin J. Bicknell to Noah Brown was executed after the deed from Noah Brown to Clarey Bicknell, and therefore becomes color of title, and when accompanied by adverse possession for the legal period ripens into actual title against any person (not under disability), including Clarey Bicknell, and those claiming under her.

It is immaterial that the land was conveyed formerly by Noah Brown by warranty deed. The grantor in such deed is not thereby estopped from asserting the adverse possession by a covenant of warranty. *Sherman v. Kane,* 86 N. Y., 57; *Stearns v. Hendersass* (Mass.), 57 Am. Dec., 65; 1 Am. & Eng., 819, and cases cited. Though the mere continued possession of the vendor of land after conveyance executed is not adverse to his vendee, or one claiming under him, yet there is nothing in their relations which will prevent the vendor from acquiring title again by adverse possession. He may disseize his grantee, and by adverse possession for the necessary time bar the latter's entry. *Tilton v. Emery,* 17 N. H., 536; *Smith v. Osage,* 80 Iowa, 84; *Reilly v. Balser,* 61 Mich., 399.

When Noah Brown took the deed from Larkin Bicknell on 16 July, 1870, and entered upon this land described in it, he is presumed to have entered under and by virtue of such title, for every possession is presumed to be under such title as the party in possession holds, and from the time such title is acquired. *Bryan v. Spivey,* 109 N. C., 57; *Hawkins v.*

Cedar Works, 122 N. C., 89. Such entry upon the part of Noah Brown, claiming under such deed, constituted an ouster, and from that time he was continuously subject to action by Clarey Bicknell and those claiming under her.

We are of opinion that his Honor was right in his proposed instruction, and that plaintiffs had no just ground for submitting to a nonsuit.

In this view of the case we deem it unnecessary to discuss the other exceptions in the record, although we have examined them and do not think they can be sustained.

Affirmed.

J. F. NANCE v. SOUTHERN RAILWAY.

(Filed 9 December, 1908).

1. **Weights and Measures — Penalty Statutes — Interpretation of Statute.**

   Revisal, sec. 3073, requires every person using weights and measures to permit the standard-keeper to test them once in every two years, and imposes a penalty upon every person "using, buying or selling" who shall fail to comply with the requirements of the statute. *Held*, that the words "buying or selling" qualify and limit the word "using," imposing the penalty only on those "buying or selling by weights and measures." The history of the legislation in regard to weights and measures reviewed.

2. **Interpretation of Statutes—Private Rights—Doubtful Meaning.**

   In interpreting a statute where the language is of doubtful meaning, the Court will reject, an interpretation which would make the statute harsh, oppressive, inequitable and unduly restrictive of primary private rights.

3. **Interpretation of Statutes — Private Rights — Public Interest — Strict Construction.**

   Statutes which restrict the private rights of persons or the use of property in which the public have no concern should be strictly construed.

This was an action to recover a penalty alleged to have accrued against defendant for refusing to permit plaintiff, standard-keeper of Surry County, to examine and adjust defendant's scales used by it at Pilot Mountain, N. C. There was no evidence that the scales were used in "buying or selling." Plaintiff showed that defendant used them in "weighing freight for shipment." His Honor being of the opinion that plaintiff could not recover rendered judgment of nonsuit. Plaintiff appealed.

W. L. Reese for plaintiff.

Manly & Hendren and *W. F. Carter* for defendant.

CONNOR, J. The right of the plaintiff to maintain this action depends upon the construction of ch. 77, sec. 3073, Revisal. The defendant insists that, correctly construed, the penalty is incurred only by a person "buying and selling" by weights and measures, and that, as it does neither, it is not within the language or spirit of the statute. Sec. 3063, ch. 77, provides, that no trader or other person shall buy or sell, or otherwise *use in trading* any other, etc. Sec. 3067: "If any person, after demand by the standard-keeper for permission to examine and adjust the same, shall buy, sell *or barter,* by any weight or measure which shall not be tried by the standard-keeper, etc., he shall forfeit and pay $40, etc." Sec. 3073 provides: "Every person *using* weights and measures and steelyards . . . . shall allow and permit the standard-keeper of the county to try, examine and adjust by the standard, *at least once every two years,* all the said weights and measures . . . . used in weighing; and every trader or dealer by profession and every miller, at least once in every two years thereafter, shall permit their weights, measures, etc., used in weighing, to be examined and adjusted by the standard-keeper of the county in which such weights, etc., are used . . . . and every person using, buying or selling by weights and measures who shall neglect to comply with the requisites of this section shall forfeit $50, to be recovered at the instance of the standard-keeper, one-half to his use and the other half to the use of the county wherein the offence is committed."

Before proceeding to discuss the principal question presented upon the appeal, we desire to call attention to the italicized sentence found in sec. 3073, and the history of the legislation upon the subject. The first statute relating to weights and measure in this State was enacted in 1741, ch. 32. See Laws of North Carolina, 1715-1796, p. 146. It will be well to note the provisions of this statute and the amendments made to it, for the purpose of aiding in the construction of Revisal, sec. 3073. The act of 1741, sec. 1, provides: "That no inhabitant or trader shall *buy or sell* or otherwise make use of *in trading,*" any other than standard weights and measures. Sec. 3 makes it the duty of the Justices to provide standard weights and measures and appoint a standard-keeper. Sec. 4: "That any person whatsoever using weights or measures shall bring all their measures and weights to the keeper of the standard, where such person shall reside or trade, to be there tried by the standard, sealed and stamped; and if any person or persons shall *buy, sell or barter* by any weights or measures which shall not be stamped," a penalty of ten pounds is imposed. Sec. 4: "And whereas steelyards, by use are subject to alteration," it is enacted "that all persons who shall use, buy or sell by steelyards shall once in every year try the same with the standard and take a certificate from the keeper, upon pain of twenty shillings, proclamation money." By ch. 965, Laws 1818, the act was again amended, "providing that every trader, buying or selling by weights and measures, shall before the first day of May next, *and at least once every two years thereafter,* cause their weights and measures to be examined, etc. And every *trader buying or selling* by weights and measures, neglecting to comply with the requisites of this act, shall forfeit the sum of fifty dollars, etc." Some doubt having arisen as to the proper construction of the statute, as amended, the Legislature of 1823, Laws, ch. 48, enacted: "That no person except traders and dealers by profession, and millers, shall be required to restamp their weights and measures, any law to the contrary notwithstanding." This statute removed any possible doubt as to the state of the law, and no further amendment was made to it when, in 1834, the commission composed of Judges Iredell, Nash and Battle revised the statute law of the State. In ch. 120, Revised Statutes, they incorporated into sec. 4 the original statute as amended, in these words: "Every person whatsoever using weights and measures shall bring them to the keeper of the standard where such person shall reside, to be there tried by the standard; and every trader or dealer by profession and every miller, shall, at least once in every two years thereafter, cause their weights and measures to be tried and adjusted." There can be no doubt that the careful and learned commissioners so construed the original statute and the amendments made previous to that time. No change was made by the several revisals of our statute law, as will be seen by reference to Revised Code (1854), ch. 117, sec. 5; Battle's Revisal (1873), ch. 116, sec. 5; Code (1883), ch. 65, sec. 3841; until 1893 (Laws 1893, ch. 100), when an act was passed making it the duty of every person using weights and measures, to allow and permit the standard keeper to examine and adjust by the standard, once in every two years, their weights and measures used in weighing. This review of the legislation upon the subject throws light upon the construction of the words used in the clause of sec. 3073, upon which plaintiff's alleged cause of action is founded. It will be conceded, that as the statute stood from 1823 until 1893 no duty was imposed upon any other persons than "traders or dealers by profession and millers," to have their weights and measures stamped once, and "*every two years* *thereafter.*" That being so, when the legislature came to impose a penalty for neglecting to "comply with the requisites of this section," it confined the penalizing language to "every person using, buying or selling." It will be noted that they are the same words used in the act of 1818, ch. 965, which is expressly limited to "every dealer buying or selling," and a legislative declaration is made in 1823, ch. 48, that they applied to "no person except traders and dealers by profession." It is difficult to foresee the results flowing from such a radical change in a statute which affects almost every home and household in this State, subjecting them to penalties which, if enforced, would seriously embarrass thousands of our citizens.

As the law is now written, it is made the duty of every person using weights and measures in North Carolina to have them tried by the standard-keeper "at least once in every two years." We have no power or right to strike the words out, or to construe them away. The language, in that respect, is too plain for construction. Every housewife, who has draw steelyards, balances, or any other kind of weights, quart or pint measures in her pantry, which she uses for domestic purposes, must allow and permit the standard-keeper *at least* once in two years to try them. Every farmer who *uses* them for his domestic or agricultural purposes to weigh in his cotton, measure in his corn, peas or other crops, whether for his own use or simply to enable him to know the yield of his land, is under like obligation. This strange result is rendered still more so when we turn to the first section of the statute and find that no one, other than a trader or other person, who shall buy or sell, or otherwise use *in trading,* any weights or measures, is required to use such as are according to the standard. In other words, a housewife who has learned that a tumbler holds a half pint, or a farmer that a rock picked up in his field weighs two pounds or a piece of iron one pound, may use it in measuring or weighing, but if either uses a "weight or measure" they must have it tried by the standard. When we turn to sec 3067 we find that any person who, after demand by the standard keeper for permission to examine or adjust his weights and measures, shall buy or sell or barter by such weights, etc., not tried, shall be penalized—but he may *use* them in any other way with impunity. The plaintiff insists that not only is the duty imposed prescribed by sec. 3073, but that for a "neglect to comply" with his demand, every person shall "forfeit fifty dollars," one half of which is for his own use. We are thus brought to enquire what, if any, effect shall be given to the words used in the penalizing clause, "using, buying or selling by weights and measure." The plaintiff insists that they perform no office, have no force and effect. That the word *using*, being all comprehensive, overshadows and, for all practicable purposes, eliminates them. It is an elementary rule in the construction of a statute that, in ascertaining the intention of the legislature, resort must first be had to the language used; in other words, the statute must, if possible, be made to speak for itself. If the legislature has used language of clear import, the Court should not indulge in speculation or conjecture for its meaning. In applying this rule the entire sentence, section or statute must be taken into consideration, and every word must be given its proper effect and weight. Courts are not permitted to assume that the lawmaker has used words ignorantly or without meaning, unless compelled to do so to prevent a manifestly absurd result. It is a rule of construction, that when words of general import are used and, immediately following and relating to the same subject, words of a particular or restricted import are found, the latter shall operate to limit and restrict the former. "One provision may be qualified by another, although it does not profess to have that effect. Words expressive of a particular intent incompatible with other words expressive of a general intent, will be construed to make an exception so that all parts of the act may have effect." "The context may thus serve to engraft an exception by implication to dispose of an apparent conflict." 2 Lewis Sutherland, Stat. Const., sec. 345. "It is the duty of the Court to adopt that sense which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the Legislature." *U. S. v. Winn.,* 3 Sumner, 209. This is illustrated in many decided cases and appeals to common sense, as if A write B, "I will come to Raleigh, Southern Railroad, to-morrow," would B have any doubt that A meant to say that he would come on the Southern Railroad to the exclusion of other roads? Would his meaning be made clearer if he had written "by Southern Railroad?" "What the legislative intent was can be derived only from the words they have used. The spirit of the act must be extracted from the words of the act and not from conjecture *aliunde."* Story, J., in *Gardner v. Collins,* 27 U. S., 93. "In the construction, both of statutes and contracts, the intent of the framers and parties is to be sought first of all in the words and language employed, and if the words are free from ambiguity or doubt, and express plainly, clearly and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation. It is not allowable to interpret what has no need of interpretation, or, when the words have a definite and precise meaning, to go elsewhere in search of conjecture in order to restrict or extend the meaning. Statutes should be read and understood according to the natural and most obvious import of the language without resorting to subtle and forced construction for the purpose of either limiting or extending their operation." *McCluskey v. Cornwell,* 11 N. Y., 593. In *State v. Cleveland R. R.,* 157 Ind., 288, the statute required the road to place in a conspicuous position at its depot a blackboard of fixed dimensions and to write thereon, at a stated time before trains were due, the time of their expected arrival. It imposed a penalty for making a false report. Suit was brought for penalties "for failing to maintain a blackboard and to the failure to put it up in a conspicuous place and to write the required information within the time fixed by the statute." *Hadley, J.,* said: "While it was undoubtedly competent for the Legislature to attach a penalty to the failure to place the blackboard of the prescribed dimensions and put it up in a conspicuous place . . . , it was equally competent for that body to omit a penalty for such things and impose it upon the neglect of what it deemed a more important duty." In *R. R. v. Cohen,* 49 Ga., 627, the statute required standard weights and measures used in *selling* commodities. The Court held that it could not be extended to include weights used by persons in buying, saying: "We have no authority to extend the law to cases not included in its terms. It is a penal law . . . It would be contrary to well settled rules to give this act the construction contended for, or to apply it to cases outside of its plain terms." In *Coe v. Lawrence,* 72 E. C. L. (1 Ellis & B.), 516, it was sought to recover a penalty for violating a statute. Defendant claimed that he was not within its terms. It was insisted that the Court could find an intention to include him. *Lord Campbell, C. J.,* said: "We are not justified in inserting words for the purpose of extending a penalty clause to cases not expressly comprehended in it. . . . . By putting the correct grammatical construction on the words, we may, perhaps, induce greater care on the part of those who frame the laws." Lord Coleridge said: "I never heard that it was allowable to insert words for the purpose of extending a penal clause. . . . . And even if that were not so, it is quite wrong to alter the language of a statute for the purpose of getting at its meaning," and of the same opinion were all the Judges. In *Thomas v. Stephenson,* 75 E. C. L. (2 Ellis & B.), 108, a standard-keeper entered a shop and seized a weighing machine. It was held that the machine was not within the language of the statute and he was compelled to surrender it. In *State v. Cleveland, supra,* the learned Justice said: "The Court must interpret such a statute as it finds it. It cannot supply omissions by intendment." He quotes with approval these words: "When the penal clause is less comprehensive than the body of the act, the Courts will not extend the penalties provided therein to classes of persons or things not embraced within the penal clause, even when there is a manifest omission or oversight on the part of the Legislature." 26 Am. & Eng. Enc., 660. If, as is manifest, the Court cannot insert words to enlarge its scope, certainly they may not strike them out to reach a class of persons which they clearly exclude. We have thus far confined the discussion to the obvious meaning of the words "buying or selling" as related to the word "using." Unless they restrict, limit, the word "using," they have no force or effect, and the lawmakers for more than a century and the several Code Commissions have done a vain thing. We may not thus eliminate the words without violating the first principle of construction.

If, however, the words in controversy are of doubtful meaning, and we were compelled to seek the intention of the Legislature by resorting to other rules, it would be our duty to examine the history of the legislation upon the subject, ascertain the legislative policy in dealing with it. It is perfectly manifest from the original act, the amendments and revisals, that the Legislature never intended to penalize the neglect to have weights and measures *used* for purposes other than buying and selling tested. Again, if, after exhausting all primary rules, we are left in doubt as to the meaning of the statute, we should consider the results likely to flow from a proposed construction and, if they are oppressive, restrictive of primary rights, harsh and inequitable, we should, if possible, without doing any violence to the words used, reject such construction. "When the words are not precise and clear, such construction will be adopted as shall appear most reasonable and best suited to accomplish the objects of the statute, and when any particular construction would lead to absurd consequences, it will be presumed that some exception was intended by the Legislature to avoid such construction." *Shaw, C. J.*, in *Com. v. Kimball*, 41 Mass., 370. In the light of the history of this legislation and the language used by the lawmakers, it would lead to most startling and unexpected results to hold that every standard keeper in North Carolina may bi-ennially invade the privacy of every home, demand entrance into the pantry of the housewife, the barn or shelter of every farmer and demand, under pain of a penalty of fifty dollars, that he be permitted to test and adjust every weight and measure without regard to the use to which it is put. To so hold would invite a swarm of inquisitive officers extorting fees out of the people or subjecting them to penalties. It is true that the defendant is a corporation, and it may be that it should be included with traders and professional dealers, but, as in the case of millers, omitted from the original act, they should be brought in by legislative enactment and not by judical construction. Again, statutes which restrict private rights of persons, or the use of property in which the public has no concern, should be strictly construed in favor of the citizen. It will never be presumed that the Legislature intends to impose burdens upon the citizen or interfere with his primary rights further than is demanded by the general welfare. While it is a matter of public concern that traders and dealers by profession, engaged in buying and selling, and millers, should be required to use standard weights and measures, and their regulation is within the police power, it is of no concern whatever to the public whether persons using such weights and measures for purely personal, domestic or agricultural purposes, do so. This is clearly recognized by the first section of the statute. To enlarge the penalty clause to include such purposes, even if the language was of doubtful import, would violate this rule and trench upon the reserved rights of the citizen. We are not permitted to apply rules of construction to corporations, for the purpose of bringing them within penalty laws, and refuse to do so in suits against other citizens. If the Legislature deems it wise to include railroads using weights for fixing the amount of freight to be charged for shipment, it is clearly within its power to do so. We have given to this case our most careful consideration, notwithstanding the small amount involved. In case of doubt, we should find it our duty to resolve such doubt in favor of the citizen and the security of his home from invasion by over-zealous standard keepers, making their biennial visits to extort fees or, upon provoking refusal, from their instituting actions for penalties. While the statute, construed as it was written prior to 1893, is wise and wholesome, if used to annoy and vex the people it will be further restricted by exceptions of counties, as has been done to some extent, until we will have a law requiring the use of standard weights and measures in "buying and selling" in only those counties in which it is not enforced. His Honor rendered judgment of nonsuit because the State was not joined as plaintiff. We affirm his judgment for the reasons set forth in this opinion.

Affirmed.

CLARK, C. J., dissenting: Revisal, sec. 3073, requires "every person using weights and measures," etc., to permit the standard keeper of the county "to try, examine and adjust" them at least once every two years, and especially enumerates, for emphasis, "every trader, or dealer by profession, and every miller." This section further provides, "every person using, buying or selling by weights and measures, who shall neglect to comply with the requisites of this section, shall forfeit $50," etc. Certain counties are exempted from this section, but Surry County is not one of them.

The words "every person using, buying or selling," means, grammatically, "using, or buying or selling." The words must be given a reasonable construction to effectuate the purpose of the Legislature. To restrict the meaning to "buying or selling" is to eliminate the word "using," which the law-makers put into the statute. It would eliminate "millers" (whom the section expressly mentions) and railroad companies, cotton ginners and others doing a large business with the public, though not buying or selling. It would thus eliminate from the statute the very class whose weights, measures and scales most need "trial, examination and adjustment" for protection to the public, while subjecting to the law every little dealer who buys or sells a few small articles. This surely would seem like "sticking in the bark."

On the other hand the word "using" must be given a reasonable construction with a view to the protection to the public for which purpose the statute was passed. "Using" cannot apply to persons using weights and measures solely for their own purposes. There is no need to protect them against themselves. The object of the statute is to protect the public against those using false or incorrect weights in dealing with the *public,* and such protection is not restricted to those "buying or selling," but embraces those "*using* (or) buying or selling."

Millers and railroad companies come within the definition "using," while "buying or selling" embraces "traders or dealers by profession," named in the statute. Considering the manifest object of the act, which is to protect the public from imposition by those "using (or) buying or selling," it would seem clear that "using" does not apply to those using weights and measures for their own purposes, but that this word is put into the statute for the very purpose of extending the act beyond those "buying or selling," and especially applies to railroads and millers who "use" weights and measures in dealing with the public, though they do not "buy or sell."

HOKE, J., dissenting: I cannot concur in the disposition made of this case, and am of opinion that a statute, plain in meaning and in the main beneficent of purpose, is likely to have this meaning obscured, and this purpose to a large extent frustrated by too much judicial construction. It has always been considered desirable and necessary that the weights and measures of our people should conform to a known and established standard, for even when owned by private persons, they are not infrequently used by them and their neighbors in transactions of sale and barter, though not to such an extent as to make such persons regular dealers. Pursuant to this laudable purpose, there has been time out of mind, in a section of our statute addressed to the question of weights and measures, a requirement that every person using weights and measures should bring all his weights, measures and steelyards to the standard-keeper of the county where such person shall reside or trade, and have them tried by the standard; and every trader or dealer by profession, and every miller, at least once in every two years thereafter, shall cause their weights, measures, etc., to be examined and adjusted by said standard-keeper, . . . and every person using, buying and selling by weights and measures, who shall neglect to comply with the requisites of this section, shall forfeit $50.

This was the law in the Revised Statutes, enacted in 1836 and 1837, which has the expression: "Every person, whatsoever, using weights and measures shall bring," etc., and the penalty clause was evidently intended to apply to all persons mentioned in the former portions of the section, that is, to every person, whatsoever, using weights and measures, and to every trader and dealer by profession, and to every miller. See Revised Statutes, ch. 120, sec. 4. The distinction in this law between ordinary persons and regular dealers and millers, was that the two last were required to bring their weights to the standard-keeper every two years.

In the Code of 1856, the same law appears in substantially the same terms. Revised Code, ch. 117, sec. 5, and also in the Code of 1883, in Vol. 2, sec. 38-41, in substantially similar terms, except that the word "balances and other instruments used in weighing" were added to "weights, measures, and steel-yards," this change having been made pursuant to an amendment in ch. 126 of the Laws of 1866 and 1867. This continued to be the law until the session of 1893, when the Legislature, being well aware of the increasing size of the different weights and measures coming into general use, making it difficult and well nigh impossible to carry some of them at least to the standard-keeper, and being impressed also with the increased importance of having these weights and measures conform to the standard, enacted that, instead of the owners bringing their weights, measures and other implements to the standard-keeper to have them examined and adjusted, it should be the duty of that officer to visit "every" such person using weights and measures, embracing balances and other implements used for weighing, and that they shall allow and permit this adjustment, and that this duty should be performed at least once in every two years. Laws of 1893, ch. 100, 207.

The capable and learned commissioners who framed the Revisal of 1905, have incorporated this amendment into the statute on weights and measures, being ch. 77, sec. 3073, and being aware that in codifying laws it is generally desirable to make as little change as possible in terms used and approved, and the meaning of which has become known, they have placed the amendment where it belonged, in the former portion of the section, leaving the portion referring to millers, traders and dealers by profession as it had always stood; and the law, as applicable to the question we are discussing, reads as follows:

"SECTION 3073. MAY TEST EVERY TWO YEARS—PENALTY—EXCEPTION.—That every person using weights and measures and steel-yards, embracing balances and other instruments used in weighing, shall allow and permit the standard-keeper of the county to try, examine and adjust by the standard at least every two years all the said weights, measures, steel-yards, embracing balances and other instruments used for weighing; and every trader or dealer by profession, and every miller, at least once in every two years thereafter, shall permit their weights, measures, etc., to be examined, adjusted, etc. . . . and every person using, buying or selling by weights and measures, who shall neglect to comply with the requisites of this section, shall forfeit $50.00."

It was the reasonable and evident purpose of the law-makers to include within the penal clause, in the latter part of the section, all upon whom a duty was imposed in the former part, to allow the standard-keeper to examine and adjust their weights and measures, etc.; that is, every person using weights and measures, millers and all regular traders and dealers. And in the penalty clause they intend to, and did, employ terms sufficiently broad and comprehensive to include them all—every one using weights and measures, every one buying or selling by weights and measures, and the term "using" being sufficient to include millers and all toll-takers, these last were not repeated; and the codifyers in this penalty clause expressed the legislative intent, by imposing the penalty on every person using, buying or selling by weights and measures. This is the clear import of the words from their definition, purpose and placing, and the position finds support, if support were needed, by the fact that, in a different section of the act, sec. 3067, a separate penalty is imposed for buying and selling on unadjusted and unstamped weights and measures.

The Court, it seems, being of opinion that to enforce the law as it is written might result in having domiciliary visits on the part of some over-zealous official to the disturbance of the serenity and calm of some imaginary "housewife," do not, to my mind, interpret the law as it is written, applying it, as required, "to every person using, buying and selling by weights and measures," but have decided to strike out the comma after "using" and insert the word "by" between the words "using" and "buying," thus making the penal clause of the statute read: "And every person using by buying and selling by weight and measures who shall neglect, shall forfeit," etc. And by what authority is this word to be added by the Court to a law which it is clearly within the province of the Legislature to enact? It is a familiar principle of statutory construction that the meaning of a statute must first be sought in the language of the statute itself, and it is only where there is uncertainty in its meaning that construction is to be resorted to and words taken from and added to expressions which the Legislature has seen proper to make.

Says Black on Interpretation of the Law, sec. 26: "The meaning of a statute must first be sought in the language of the statute itself, and therefore, if the language is plain and free from ambiguity and express a simple, definite and sensible meaning, that meaning is conclusively presumed to be the meaning which the Legislature intended to convey."

And this statement of the doctrine is fully supported in numerous and well considered decisions in courts of the highest authority, several of them cited and referred to in the opinion of the Court, notably in *McCluskey v. Cornwell,* 11 N. Y., 601, where *Allen, J.,* for the Court, quotes with approval the rule as well expressed by *Judge Johnson,* in *Newell v. The People* (3 Selden, 97), in these words: "Whether we are considering an agreement between parties, a statute or a constitution, with a view to its interpretation, the thing we are to seek is the thought which it expresses. To ascertain this, the first resort, in all cases, is to the natural signification of the words employed, in the order and grammatical arrangement in which the framers of the instrument have placed them. If thus regarded the words embody a definite meaning, which involves no absurdity and no contradiction between different parts of the same writing, then that meaning apparent upon the face of the instrument is the one which alone we are at liberty to say was intended to be conveyed."

Indeed, as stated, it is a well recognized and accepted principle of statutory construction, that when the language of a statute has a definite meaning and its enactment is in the constitutional power of the Legislature, it is not for the courts to alter or set it aside, because they may deem its provisions unwise, or because, in their judgment, it may lead to harmful results.

Said *Nash, Chief Justice,* in *Taylor v. Commissioners,* 55 N. C., 144: "Whether the Legislature acted wisely or not, is a question with which we have nothing to do. The power being admitted, its abuse cannot affect it; that must be for the legislative consideration. It is sufficient that the judiciary claim to sit in judgment upon the constitutional power of the Legislature to act in a given case; it would be rank usurpation for us to enquire into the wisdom or propriety of their acts."

And to what purpose is this alteration of the statute made? One of the chiefest objects of the enactment of this law was to require that the weights and measures of the public millers of the country should be adjusted by the standard and kept free from suspicion, and yet the decision of the Court withdraws from the effect of the penal clause all public millers, for, as a rule, certainly in taking toll, they neither buy nor sell, in the ordinary acceptation of the term; and it withdraws also the weights and measures used in cotton gins, and the now very general method provided for weighing wagons of hay, and other heavy articles, the proprietors of these, as a rule, neither buy nor sell; and, as in this instance, the scales and balances used by railroads, and by which a large portion of the freight rates are fixed and collected, are likewise withdrawn from the penal effects of the statute; all because of an apprehension that there might be some abuse in the administration of the law to the annoyance of individual owners of these implements. This apprehension is not original with us. After the enactment of the statute, requiring the standard-keeper to visit all persons using weights and measures, several counties, considering that the law might be subject to abuse by some over-zealous official, had themselves excepted from the effects of the statute. It was so in Lincoln, Gaston, Beaufort, and some other counties. In the counties of Camden and Currituck the period was changed from two to four years. By chap. 378 of the Laws of 1905, quite an elaborate provision was made as to the effects of the law in Wilson County, and it was enacted, as to that county, that: "When any person has had his weights and measures tried by the standard, and stamped or sealed as aforesaid, he shall not be required to have them tried by the standard again unless some responsible person in the county of Wilson shall make oath and file the same with the standard-keeper of said county that he has reason to believe that said weights and measures are not properly adjusted; that notice shall be given the owner of said weights and measures that complaint has been made under oath as aforesaid, and then the owner of said weights and measures shall have them tried, as provided under this act, sec. 3841 of the Code, and be subject to the penalty of sec. 3842." These ill-advised counties, desiring a change of the law, went to the Legislature for that purpose, erroneously supposing that that body only had the right to make alterations of the kind desired.

Even on grounds of expediency, and in reference to those persons whom the Court holds are not within the penal clause of the statute, the construction adopted is neither wise nor desirable. Where weights and measures are used for the purpose of exchange and sale, and this is frequently being done by private owners, though not to such an extent as to make them regular dealers, and when they are used for purposes of measuring toll, as at public mills, cotton gins, etc., or for establishing the amount to be paid for the carriage of freight, as in this instance, there is nothing more harmful than to have suspicion aroused and active as to the integrity of their weights. It is eminently desirable, even from their standpoint, to have the inspection of some public official, whose duty it is to interfere and whose action will serve to correct an erroneous impression concerning them and restore them to the confidence of the community.

Believing that the action of the Court is not grounded on right reason or sustained by any well considered authority, I am compelled to withhold my assent to the decision they have made in this case.

MATTIE LANIER et al. v. J. D. HEILIG.

(Filed 9 December, 1908).

1. **Judgments, Proceedings to Set Aside—Irregularities—Motion in the Cause.**
   Proceedings to set aside for alleged irregularities the final judgment of a Court having jurisdiction of the parties and subject matter, should be by motion in the original cause and not by an independent action.
2. **Same—Lack of Parties—Equities.**
   A final judgment of a Court having jurisdiction of the parties and subject matter will not be set aside for irregularities, when it appears that all of the parties in interest are not before the Court so that the equities may be administered and full and complete justice done.

ACTION tried before *Moore, J.*, and a jury, May Term, 1907, of ROWAN.

The facts material to a decision of this appeal, as disclosed by the pleadings and the verdict, are: Jas. B. Lanier died intestate, domiciled in Rowan County, 8 December, 1894, leaving C. G. Lanier, J. B. Lanier, Jr., and present plaintiffs, his heirs-at-law. Lee S. Overman was duly appointed and qualified as administrator of J. B. Lanier, deceased. He instituted a special proceeding against the heirs of his intestate for the purpose of subjecting a portion of the real estate, owned by him, to sale to make assets for the payment of his debts. In that proceeding, after several ineffectual efforts to sell the land, the administrator was permitted to take a nonsuit 18 February, 1901. Further reference to the record in that proceeding is unnecessary here. Mattie Lanier, one of the plaintiffs herein, on 11 April, 1895, instituted a proceeding before the Clerk of the Superior Court of Rowan County, in which the other heirs at law of J. B. Lanier were made defendants for the purpose of having the land in controversy, together with other lands of said Lanier, sold for partition. The defendant C. G. Lanier filed an answer alleging that the estate was unsettled and that the debts were unpaid; that a sale of the lands would be necessary to pay said debts. The Court denied the relief demanded and plaintiff appealed, but did not perfect or prosecute her appeal. Thereafter an order was made in the cause, appointing a receiver to take charge of the lands and rent them out, etc. At November Term, 1896, Lee S. Overman, administrator of Jas. B. Lanier, filed a petition, and a supplemental petition, asking that he be made a party to said special proceeding. He alleged, at May Term, 1898, that a sale of the lands was necessary to pay the debts of his intestate. An order was made in the cause by Judge McIver directing the Clerk to issue notices to all the parties to the proceeding, to show cause, before him, at Statesville in said district, why the prayer of the petitioner should not be granted. No answer was filed to the petition on the return day at Statesville, N. C., except by the *guardian ad litem*. Judge McIver found, as a fact, that service was made on the parties; that the personal estate of J. B. Lanier was insufficient to pay his debts and that a sale of the lands described in the petition was necessary therefor, and ordered that they be sold by Overman, administrator and commissioner, at public auction after advertisement, and that he make report of said sale, etc. At the August Term, 1898, of the Superior Court of Rowan County, an order was made by Judge O. H. Allen remanding the cause to the Clerk of the Superior Court "in order that he may resume his original jurisdiction and receive and pass upon the reports of Lee S. Overman, administrator, and proceed to final judgment, etc. On 20 September, 1898, said Overman, administrator and commissioner, filed his report setting forth that, pursuant to the order of Judge McIver, he had sold a number of tracts of land, among them lot No. 14, containing 43 acres (being the land in controversy) to J. D. Heilig for $22 per acre, aggregating $953.75, and that said sum was a fair price for same. On 29 September, 1898, the sale was duly confirmed, and the administrator directed, upon payment of the purchase money, to make title to the purchaser. On the same day Lee S. Overman, administrator, executed a deed to the defendant for said land (lot No. 14).

This action is brought by the plaintiffs, heirs at law of J. B. Lanier, against defendant J. D. Heilig, "for the purpose of impeaching the judgment signed at Statesville, Iredell County, as being irregular and void, and for the purpose of securing a resale of the lands, the subject of this controversy." The plaintiffs allege fraud in the proceeding, sale, etc., all of which is denied in the answer. The Court submitted a series of issues directed to every phase of the controversy, and the verdict under the direction of the Court establishes the foregoing facts. The eleventh issue was directed to the question whether John L. Rendleman was "lawfully appointed *guardian ad litem* of certain infant defendants." The jury found, under instructions, that summons was duly served on the infants, and that the *guardian ad litem* was lawfully appointed. The twelfth issue was directed to the enquiry whether plaintiffs were the owners of the land in controversy. This was answered in the negative, under the instructions of the Court. Plaintiffs excepted. No issue was tendered or submitted in regard to the allegations of fraud. The plaintiffs requested his Honor to submit the following issue: "Was the price paid by defendant a full and fair value for the lands described in the complaint?" His Honor declined to do so, and plaintiffs excepted. The plaintiffs excepted to the rejection of certain questions, noted in the opinion. Judgment was rendered upon the verdict for defendant. Plaintiffs excepted and appealed.

G. W. Garland for plaintiffs.

J. L. Henderson, T. F. Kluttz, L. H. Clement, Adams, Jerome & Armfield for defendant.

CONNOR, J., after stating the facts: It is settled, by a long and uniform line of decisions of this Court, that a final judgment can be attacked for fraud in its procurement only by an independent action. *Fowler v. Poor*, 93 N. C., 466; *Syme v. Trice*, 96 N. C., 243; *Brickhouse v. Sutton*, 99 N. C., 103; *Smith v. Fort*, 105 N. C., 446, and many other cases. As no issue was tendered upon the allegation of fraud, and as we find no evidence tending to sustain the allegation, that phase of the case is eliminated. It is equally well settled, that for irregularities in the progress of the cause a motion is the proper and only remedy; and this is true, notwithstanding there is a final decree. In *Fowler v. Poor, supra, Merrimon, J.,* after holding that for alleged fraud a new action is the only remedy, says: "It would be otherwise, however, if the purpose were to set the judgment aside for irregularity. In such a case a motion in the cause, although the action be ended, is the proper remedy." In *Morris v. White*, 96 N. C., 91, the same Justice said: "The Court properly held that the plaintiff's remedy was by motion, or other appropriate proceeding, in the action in which the decree complained of was granted. They seek to have the decree set aside upon the ground of irregularity in it and in the proceedings in the action leading to it. It was competent, and the appropriate remedy, to move in the action within a reasonable time after the decree was granted to set it aside for such cause, and this is so although the action was ended." This is the settled practice in this State from which we find no deviation. His Honor, after plaintiff's failure to tender an issue upon the allegation of fraud, should have dismissed the action.

The issues submitted were properly answered and fail to show any such irregularity as would justify the Court in setting aside the judgment and the sale. If a motion in the cause had been made and the facts found by the jury herein, established, the Court would not have set aside the judgment and sale, made pursuant to it, as to the land purchased by defendant and left it standing as to the other tracts of land. The plaintiff Mattie Lanier purchased at the sale a part of the land, and a number of other persons purchased other parts. The purchase money has been paid and applied to the debts of James B. Lanier. If the sale was made pursuant to an irregular judgment, and is for that reason to be set aside, the Court would be compelled to administer the equities growing out of the transaction, subrogating the purchasers to the rights of the creditors. This would necessitate having all of them before the Court that full and complete justice should be done. To set the sale aside as to defendant's tract, and restore it to the heirs, leaving the other purchasers in the enjoyment and ownership of the tracts purchased by them at the same time and under the same judgment, would be unjust. No Court having equitable powers, or proceeding upon well settled doctrines of equity, would do so. We have examined the entire record, and while there appears to have been some irregularities, it is manifest that the Court had jurisdiction of the parties and the subject matter; that the parties were notified of the several steps in the proceeding, and some of them participated in the purchase of land under the judgment. There is no suggestion that the findings of fact by Judge McIver were not correct. The parties, after notice, failed to attend the hearing or controvert the allegations of the petition on the part of Mr. Overman to intervene. The sale was properly conducted and duly reported and confirmed. Courts are reluctant, in the absence of fraud, to set aside judgments and disturb rights acquired under them, for mere irregularities, especially when the parties complaining have delayed action for a long time. The sale was confirmed and deed made 29 September, 1898, and this action was brought 5 August, 1905. While the judgment of his Honor must be affirmed, because the plaintiff's remedy, for alleged irregularities, was a motion in the cause upon the entire record, no other judgment could have been rendered for other and manifest reasons. There is no suggestion that defendant had any knowledge of the alleged irregularities. An examination of the judgment would not have disclosed them. Even when a judgment is set aside for irregularities, the rights of innocent parties acquired under it, will not be disturbed. It is only when the judgment is void because the Court had no jurisdiction of the persons or the subject matter that rights acquired will be disturbed. In such cases, if the purchase money has been applied in exoneration of the land, the purchaser will be subrogated to the rights of the creditors. This is common learning and manifest equity. There is

No error.

PEELE & COPELAND v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 9 December, 1908).

1. **Carriers of Goods—Shipper's Load and Count—Bill of Lading—Presumptive Evidence—Rebuttal.**

   When it is admitted that it was the consignor's duty to load a car for shipment, which had been placed at its mill for the purpose by the carrier, and that the carrier's agent gave a bill of lading upon the statement of the consignor that the car had been loaded, without being required to verify the statement, the bill of lading is not presumptive evidence of the receipt of the contents of the car, for the carrier's *prima facie* liability is rebutted by the admissions, and the question is an open one for the jury, in a suit by the consignee for the value of the contents of the car, and for the penalty for failure to deliver under Revisal, sec. 2632.

2. **Same—Burden of Proof.**

   When, in a suit by the consignee against a carrier for the value of a carload shipment, and penalty for failure to deliver, under Revisal, sec. 2632, it was admitted that it was the duty of the shipper to load the car; and that the carrier was not required to verify the loading, but gave the bill of lading, in evidence, upon the statement of the shipper, the burden of proving the contents of the car is upon the consignor, under the doctrine that he who has the best opportunity of knowing the facts must prove them.

Action tried on appeal from a justice's court before *Guion, J.*, and a jury, June Special Term, of 1908, of Wayne; to recover the value of certain rice meal, together with the penalty for failure to deliver, under sec. 2632 of the Revisal.

The following issues were submitted:

1. Was the 20 sacks of rice meal delivered to Atlantic Coast Line Railroad Company on 11 March, as alleged?

Answer: "Yes."

2. If so, was the freight transported and delivered to plaintiff in a reasonable time?

Answer: "No."

3. If not, how long was such freight delayed in delivery? Answer: "Thirty days."

4. In what sum is defendant indebted to plaintiff? Answer: "$87.55."

From the judgment rendered the defendant appealed.

Geo. E. Hood for plaintiff.
W. C. Munroe for defendant.

BROWN, J. Upon a first consideration of this case we were with the plaintiffs, and thought there was no *material* error committed upon the trial, and in consequence a *per curiam* judgment was announced. Before the judgment of this Court was certified down we have of our own motion re-examined the record, and find an error which we now think is of sufficient importance to require another trial.

The evidence tends to prove that plaintiffs purchased from the Carolina Rice Mills, at Goldsboro, N. C., twenty sacks of rice meal. At the request of the Carolina Rice Mills, the defendant Company placed one of its cars on a side track at the mills of the Carolina Rice Mills, which were located about one mile from the freight depot of the defendant company. On the 9th day of April, 1907, the Carolina Rice Mills filled out a bill of lading for twenty sacks of rice meal, which purported to have been loaded by the Carolina Rice Mills in said car, directed to the plaintiff at Fremont, N. C. The agent of the Company, without any other knowledge of the presence of said rice meal in said car than such statement of the Carolina Rice Mills, signed said bill of lading. The Carolina Rice Mills retained said car at its mill until the 12th day of April, 1907, and loaded shipments therein on the 11th of April, 1907. On the 12th of April, 1907, the said car was moved from the mills of the Carolina Rice Mills to Fremont, N. C., and other points beyond. On the 15th day of May, 1907, 18 sacks of the rice meal, which purported to have been loaded into the car of the defendant company on the 11th of April, were delivered to the defendant from the depot of the Southern Railway on the 15th day of May, 1907, which was forwarded by the defendant to the plaintiffs, and delivered to them, on the 19th of May, 1907. Freight could be transported from Goldsboro to Fremont in one day, and there was no intermediate point. At the time the car of the defendant company was on the side track at the Carolina Rice Mills, a car of the Southern Railway was standing on the track at the Carolina Rice Mills for the purpose of being loaded.

Counsel for defendant contends in his brief that the plaintiffs' own evidence discloses that defendant had nothing to do with the loading of the car, and, the loading having been done by the shipper, that the shipper made a mistake, and that the rice meal intended for the plaintiff, and to be put in the defendant's car, was loaded into the car of the Southern Railway, which after going to its destination, returned the rice meal to its depot in Goldsboro, from whence it transferred it to the defendant company on the 15th day of May, and that none of said rice meal was loaded into the car of the defendant, as it purported to have been, on the 11th of April.

The defendant's 1st exception is as follows: "His Honor charged the jury that the bill of lading was presumptive evidence that the defendant received the shipment at the time specified therein. The defendant excepts to this charge for the reason that the bill of lading being what is called 'Shippers Load and Count,' that is, the shipper having had entire charge of the loading, and having made out the bill of lading, and the defendant, having no knowledge of the contents of the car, except such as was communicated to it by the shipper, there was no presumption as against the defendant, that the car contained the articles stated in the bill of lading."

We think the exception is well taken.

The plaintiffs' witness Oettinger, testifies that he received an order for the rice, that he ordered a car and loaded it, that the defendant had nothing to do with the loading; that he filled out the bill of lading for the shipment to plaintiffs and sent it to the depot of defendant where its agent signed it; that he retained the same car and loaded other shipments into it and delivered the loaded car to defendant on 12 April.

Ordinarily a bill of lading is *prima facie* evidence that the carrier received the goods described in it. 4 Am. & Eng., 527. But the carrier is not bound by the bill of lading even where its agent receives the goods and loads the car. It may show as a matter of fact that the goods were not received. *Black v. R. R.,* 93 N. C., 42. The bill of lading is but *prima facie* evidence. *The Lady Franklin,* 8 Wallace, 327.

In this case the plaintiffs rebutted the *prima facie* case by their own evidence. Oettinger was not only their witness, but their agent to ship the rice meal. He says he loaded the car and made out the bill of lading and sent it to defendant's agent, who signed it, relying upon Oettinger's loading and counting. The transaction constituted what is called in the parlance of common carriers, "Shippers Load and Count."

The shipper has the right to compel the agent of the carrier to verify the loading and counting, but where, as in this case, plaintiffs' evidence shows that it was all done by the shipper, the *prima facie* liability of the carrier usually arising upon the issuance of the bill of lading is rebutted, and it becomes an open question then for the jury, with the burden upon the plaintiffs to prove, as a fact, that the goods were actually delivered to the carrier by the shipper, who did the loading and counting.

His Honor's ruling would seem to reverse the general rule that the burden of proof is on him who has the best opportunity of knowing the facts.

When goods are delivered to a carrier for transportation and are injured while in transit, the carrier is required to exculpate itself from negligence, because it has the best opportunity of knowing and proving how the injury occurred.

It would seem reasonable therefore, that the shipper, having the best opportunity, and the only opportunity of knowing the contents of this car, should be called upon to prove its contents. *Fitzgerald v. Adams Express Co.*, 24 Ind., 447; Current Law, Vol. 1, page 427, and Vol. 7, page 533, and cases there cited. *Gulf R. R. v. Massenburg*, 98 S. W., 68.

New Trial.

MARGARET TRIPLETT et al. v. M. C. WILLIAMS.

(Filed 9 December, 1908).

1. **Deeds and Conveyances—Construction—Formal Parts—Intent of Grantor.**

   The whole of a deed should be so construed as to effectuate the plainly expressed intention of the grantor, and so as to prevent the technicalities of the common law rule of construction, now obsolete, which regards the granting clause and the habendum and tenendum as separate and independent, each having its own special functions, from overriding the intention so expressed.

2. **Same—"Heirs"—Limitation in Habendum.**

   The premises of a deed to land read, among other things, "unto said M. G., her heirs and assigns"; and the habendum, "to herself, the said M. G. during her life time, and at her death said land is to be equally divided between" her children. *Held*, (1) Since under the act of 1879, now Revisal, sec. 946, the same estate would have passed if the word "heirs," an established formula, had been omitted in the granting clause, there is no repugnance in this deed between the granting clause and habendum; (2) The limitation of the estate in the habendum, and the creation of an estate in remainder therein, were conclusive proof that there was no intention of the grantor to create an estate in fee, but an estate for life to M. G. with a remainder over to her children.

3. **Contracts to Convey Lands—Equity—Parties—Imperfect Title.**

   Specific performance of a contract to convey an indefeasible title to lands will not be enforced in equity against a purchaser, at the suit of one having the life estate, when those in remainder have not been made parties and would not be bound by the decree.

ACTION tried by *Murphy, J.,* who found the facts by consent, October Term, 1908, of WILKES.

Civil action to compel specific performance of a contract for the sale of land. The defendant pleads that the plaintiffs are unable to make good and indefeasible title in fee. The cause was heard at October Term, 1908, of the Superior Court of WILKES County, his Honor, *Judge Murphy* presiding. The Court rendered judgment against the defendants, who appealed. The facts are stated in the opinion of the Court.

Hackett & Gilreath for plaintiffs.
W. W. Barber for defendant.

BROWN, J. The title of the *feme* plaintiff, Margaret, depends upon what construction is given to a deed executed to her by John Greenwood and wife, dated 30 May, 1885, containing the following premises, "unto the said Margaret Greenwood, and her heirs forever, the following land," followed, after describing the land, by the following habendum: "to have and to hold the same, together with all privileges and appurtenances thereto belonging to herself, the said Margaret Greenwood, *during her life time,* and at her death said land is to be equally divided between the children of said Margaret Greenwood."

It is true, as contended, that according to the common law, as followed in previous decisions of this Court, the plaintiff acquired a fee simple in the premises of the deed which could not be divested by the habendum. The habendum part of a deed was originally used to determine the interest granted, or to lessen, enlarge, explain or qualify the premises, but it was not allowed to divest an estate already vested by the deed, and was held to be void if repugnant to the estate granted in the premises. 2 Black. Com., 298; 4 Kent. Com., 468; *Hafner v. Irwin,* 20 N. C., p. 570.

We concede all that is contended for as to the common law rule of construction, and that it has been followed in this State. But this doctrine, which regarded the granting clause and the habendum and tenendum as separate and independent portions of the same instrument, each with its especial function, is becoming obsolete in this country, and a more liberal and enlightened rule of construction obtains, which looks at the whole instrument without reference to formal divisions, in order to ascertain the intention of the parties, and does not permit antiquated technicalities to override the plainly expressed intention of the grantor, and does not regard as very material the part of the deed in which such intention is manifested.

This is not only the decided trend of modern adjudication, but it is the legitimate and necessary result of legislation in this and other States.

In his work on deeds, Mr. Devlin states the prevalent rule of construction as follows: "It may be formulated as a rule, that where it is impossible to determine from the deed and surrounding circumstances that the grantor intended the habendum to control, the granting words will govern, but if it clearly appears that it was the intention of the grantor to enlarge or *restrict* the granting clause by the habendum the latter must control." 1 Dev. on Deeds, sec. 215; *Dodine v. Arthur,* 91 Ky. 53.

In the above cited case the Kentucky Court states the proper rule of construction as follows: "It is undoubtedly true that in case of repugnancy between the two, and it cannot be determined from the whole instrument with reasonable certainty that the grantor intended that the habendum should control, the conveying clause must, for the reason that words of conveyance are necessary to the passage of the title, and the habendum is not ordinarily an indispensable part of a deed. Hence, in the case above indicated, the conveyancing clause must control. But where it appears from the whole conveyance and attending circumstances that the grantor intended the habendum to enlarge, restrict or impugn the conveying clause, the habendum must control.

It is in such case to be considered as an addendum or proviso to the conveyancing clause, which, by a well settled rule of construction, must control the conveying clause or premises even to the extent of destroying the effect of the same. This is so, because it is the last expression of the grantor as to the conveyance, which must control the preceding expression." See also *Henderson v. Mack*, 82 Ky., 379; *Ratliffe v. Mars*, 7 S. W., 395; *Fogarty v. Stack* (Tenn.), 8 S. W. Rep., 846.

The Supreme Court of California says, that "for the purpose of ascertaining the intention the entire instrument, the habendum as well as the premises is to be considered, and if it appears from such consideration that the grantor intended by the habendum clause to restrict or limit the estate named in the granting clause the habendum will prevail over the granting clause." *Barnett v. Barnett*, 104 Cal. 298; *Moore v. Waco*, 85 Tex., 206.

"All parts of a deed should be given due force and effect." *Doren v. Gillum*, 136 Ind., 134.

"The premises of a deed are often expressed in general terms, admitting of various explanations in a subsequent part of the deed. Such explanations are usually found in the habendum." *Carson v. McCaslin*, 60 Ind., 334.

"Words deliberately put in a deed, and inserted there for a purpose, are not to be lightly considered, or arbitrarily thrust aside." *Mining Co. v. Becklenheimer*, 102 Ind., 76.

To discover the intention of the parties "is the main object of all constructions. When the intention of the parties can be ascertained, nothing remains but to effectuate that intention." *Elliott v. Jefferson*, 133 N. C., 215; *Salisbury v. Andrews*, 19 Pick. (Mass.), 250; *Walsh v. Hill*, 38 Cal., 481.

We can see no reason why the manifest intention of the grantor should be so carefully regarded in determining what property his deed covers and so entirely disregarded in determining what estate in that property the grantee shall take.

In his work on the Law of Real Property, Mr. Jones says: "The inclination of many Courts at the present day is to regard the whole instrument without reference to formal divisions. The deed is so construed, if possible, as to give effect to all its provisions, and thus effectuate the intention of the parties. When an instrument is informal, the interest transferred by it depends not so much upon the words and phrases it contains as upon the intention of the parties as indicated by the whole instrument." Vol. 1, sec. 568.

In support of his text the author cites in his note a great array of cases from many States.

This deed having been executed in 1885, the word heirs in the premises can have no force, or effect, as, since the act of 1879, the grantee would have taken the same estate without the use of the word as with it.

The Act, now sec. 946 of the Revisal, provides, that "when real estate shall be conveyed to any person, the same shall be held and construed to be a conveyance in fee, whether the word heirs shall be used or not, unless such conveyance shall in plain and express words show, or it shall be plainly intended by the conveyance or some part thereof, that the grantor meant to convey an estate of less dignity."

All conveyances of land executed since the passage of the act are to be taken to be in fee simple, unless the intent of the grantor is plainly manifest in some part of the instrument to convey an estate of less dignity.

It is the legislative will that the intention of the grantor and not the technical words of the common law shall govern.

This is the view taken by the Kentucky Court in construing a similar statute. *Baskett v. Sellers*, 19 S. W. Rep. 10.

Taking into consideration the whole of the deed under discussion, it is clear beyond doubt that it was the intention of the grantor that the habendum should operate as a proviso or limitation to the granting clause in the premises, and control it so as to limit the estate conveyed to his daughter Margaret to a life estate with a remainder over to her children.

The insertion of the word "heirs" in the premises was evidently in deference to an established formula and creates, in our opinion, no repugnance between the granting clause and the habendum, inasmuch as the same estate would pass to the plaintiff whether this word be inserted or omitted.

The subsequent limitation of the estate conveyed to the grantee in the habendum and the creation of an estate in remainder therein, is conclusive proof that the grantor did not intend by the use of the word heirs in the premises to create an estate in fee in the plaintiff.

There is another reason why specific performance should not be decreed in this case.

The *feme* plaintiff, according to the facts found, is now married and has several children. They have not been made parties to this action and therefore will not be bound by a decree in it.

The Court of Equity will not compel a purchaser to pay out his money for a doubtful title when his contract entitles him to an indefeasible one.

The judgment of the Superior Court is reversed, and the cause remanded with direction to enter judgment in accordance with this opinion.

Reversed.

MARTIN v. KIRKPATRICK.

(Filed 9 December, 1908).

1. **Bankrupt Act—Mortgage—Time of Execution of Power of Sale.**
The provision of the Bankrupt Act making all debts owing by the bankrupt due and payable at the date of the adjudication, does not affect the terms of a mortgage executed by him, in which the date at which the power of sale may be executed is fixed.

2. **Pleadings—Injunctions—Hearing.**
The Judge properly continued the injunction, until the hearing, upon the allegations in the pleadings.

ACTION for restraining order heard by *Moore, J.*, April Term, 1908, of CATAWBA.

The undisputed facts appearing upon the record are: On 1 September, 1905, H. E. McCombs and another conveyed to Mrs. O. W. Royster and N. E. Aull the land in controversy. Sometime thereafter they formed a partnership under the name and style of the Phœnix Manufacturing Co. On 4 May, 1907, Aull executed a mortgage on his one-half undivided interest in the land to defendant, Mrs. L. G. Kirkpatrick, to secure a note of one thousand dollars. This mortgage was duly recorded. The mortgage recites that Aull had executed his note to Mrs. Kirkpatrick for $1,000, due and payable 4 May, 1908, and in default of its payment at maturity, the mortgagee was empowered to sell the land, etc. On 29 July, 1907, Aull conveyed to Mrs. Royster his interest in the land, "subject to a mortgage on said one-half interest in said property, heretofore executed by the parties of the first part to Mrs. L. G. Kirkpatrick, to secure an indebtedness of one thousand dollars." This deed was recorded 2 August, 1907. On 13 December 1907, Mrs. Royster executed to plaintiff a mortgage on all of said land to secure a note of $3,500. Aull was, some time prior to 4 March, 1908, adjudged a bankrupt. Defendant has not proved her debt against his estate. Defendant advertised her one-half interest in the land mortgaged to her by Aull for sale under the power conferred upon her in said mortgage, the sale to take place 17 March, 1908. The plaintiff applied to Judge Councill for an order restraining and enjoining the defendant from selling. In his affidavit he avers that the land was partnership property, and that he was a creditor of the partnership which was insolvent; that the mortgage from Aull to defendant was a fraud upon the partnership creditors. He makes other averments attacking the validity of defendant's mortgage. He also alleges that the note secured by the mortgage was not due at the date of the advertisement, and would not be due until 4 May, 1908. Defendant filed answer denying the allegations of plaintiff's affidavit. A restraining order was granted, returnable before Judge Moore who, on the hearing, continued this order until the final hearing. From this order defendant appealed.

E. B. Cline and *M. H. Yount* for plaintiff.
A. A. Whitener for defendant.

CONNOR, J. The affidavits of the plaintiff and defendant present a number of controverted questions of fact which cannot be satisfactorily disposed of upon this appeal. It is manifest that, by the terms of defendant's mortgage, the power of sale cannot be executed prior to 4 May, 1908, and the advertisement was premature. Defendant, however, contends that by virtue of a provision in the Bankrupt Law, all debts are made due and collectable upon the adjudication in bankruptcy. However this may be for the purpose of proving them against the estate of the bankrupt, we do not see how this provision can effect the rights or remedies of a creditor who does not prove her debts. The power of sale in the mortgage must be enforced according to its terms, without regard to other remedies given the creditor for the collection of the debt. Our statute has the same provision when a general assignment is made by a debtor, Rev., sec. 967, but it has never been supposed that it had any other effect than to permit the creditor to proceed to collect his debt by suit, attachment, etc. It cannot be construed to change the terms of the mortgage. We forbear discussing the questions debated before us because, until the facts are found upon issues submitted to a jury, or by the Court, they are not presented. In either aspect of the case we concur with his Honor in continuing the injunction to the hearing. The parties should file appropriate pleadings and go to trial upon them, to the end that the very truth of the matters in controversy may be settled. The order continuing the injunction is

Affirmed.

N. M. CORDELL and wife v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 9 December, 1908).

1. **Telegraph Companies—Duty to Public—Message Tendered.**
A telegraph company owes a duty to the public, within the scope of its business, to receive for transmission and delivery, under its reasonable rules and regulations, a proper message tendered with lawful charges for such service.

2. **Same—Refusal to Receive—Tort.**
For the wrongful refusal by telegraph company to receive, for transmission and delivery, a message tendered, an action in tort accrues to the party injured.

3. **Telegraph Companies—Message Tendered and Refused—Torts—Measure of Damages.**
In an action arising in tort against a telegraph company for the wrongful refusal to receive a message for transmission and delivery, the damages recoverable are all such as proximately flow therefrom, and are not limited to those within the contemplation of the parties.

4. **Telegraph Companies—Message Tendered and Refused—Lawful Messages—Destination—Signature—Implied Knowledge.**
After having been sent back some twelve miles in the country by the defendant telegraph company's agent to have a message,

formerly tendered and refused, written on defendant's blank used for the purpose, the agent of the sender tendered, with charges for transmission and delivery, two messages written thereon, addressed to D., to tell C. (her husband) of the dangerous condition of his child, and to come at once. The defendant's agent had refused the first message, giving as his reason he did not know its destination, and had been informed that it was in the country some miles from its two telegraph offices, S. and B. The full charges for transmission and special delivery were tendered, and defendant's agent roughly refused to receive them because the place of destination of each were signed to the message, the sender's signature being omitted, instead of at its usual placing on the forms furnished. *Held*, (1) The messages were lawful ones; (2) They were sufficient to apprise the defendant's agent that they were for transmission to S. and B.; (3) The absence of the signature of the sender gave no indication of an unlawful design or purpose; (4) That they gave notice that the failure to send them would cause mental anguish.

5. **Telegraph Companies—Address to Third Persons—Principal and Agent—Questions for Jury.**

The evidence showing a wrongful refusal by telegraph company's agent to receive, for transmission and delivery, a message addressed to a third person, requesting him to inform plaintiff's husband of the dangerous condition of his child and for him to come at once, and it appearing that the addressee could readily have given the information to plaintiff in time for him to reach home before the burial of his child, it is for the jury to find whether the addressee as agent of plaintiff would have communicated the information to the husband.

6. **Telegraph Companies—Time of Burial—Evidence.**

Evidence of the time of burial of the person concerning whose illness a telegram has been offered to defendant to send, may be competent in an action for mental anguish arising from the wrongful refusal of defendant to receive it for transmission.

7. **Telegraph Companies—Sickness in Plaintiff's Family—Evidence Immaterial.**

In an action upon tort for the wrongful refusal of a telegraph company to receive a message for transmission, announcing an illness of a child, evidence of the number of, or the sickness in, plaintiff's family, is immaterial, and is not reversible error.

8. **Questions of Law—Findings of Jury—Harmless Error.**

Questions of law referred to the jury and properly found by them, do not constitute reversible error.

ACTION tried before *Ferguson, J.*, and a jury, May Term, 1908, of CATAWBA, to recover damages for negligence alleged in the transmission and delivery of a telegram.

The uncontradicted evidence discloses the following case: The *feme* plaintiff, on 4 September, 1907, was at her home in Catawba County, about twelve miles from Hickory, where defendant kept an office for the receipt and transmission of messages. Her husband, N. M. Cordell, was absent teaching a singing school at Berea Church, about three and a half miles from Biltmore, Buncombe County, at which place defendant kept an office, and two and a half miles from Azalea. He boarded in the neighborhood with his pupils. Daniel Cordell, his uncle, lived about one mile from Berea Church. His postoffice was at Glen Inglis, Azalea being the station on the railroad where there was a telegraph office. Swannanoa and Biltmore are on the railroad between Hickory and Asheville, and there are telegraph offices at both stations. Daniel Cordell was at Azalea on 4 September, 1907. The *feme* plaintiff's child was dangerously sick and died on that day. About four o'clock in the morning she sent her son, O. B. Cordell, a boy of sixteen years of age, to Hickory, for the purpose of sending a message to her husband. She gave him ten dollars with which to pay for the message. He testified in regard to his visit to the defendant's office: "I am seventeen years old and am the son of N. M. Cordell and wife L. B. Cordell. I was at home on 4 September, 1907. I know what this suit is about. My mother woke me up at twelve o'clock in the night and told me that I would have to go for the doctor, and I went for Dr. Hoover. I left home at four o'clock that morning to go to telegraph for my father. No one but my home folks and my grandmother were at home between twelve and four o'clock. I reached Hickory about six o'clock and went to the telegraph office, and gave the boy my little piece of paper that had been written on. He picked it up and looked at it, and told me to wait a few minutes until the gentleman came in. I did not know him at the time, but learned afterwards that it was Mr. Foster. He took up the paper and looked at it, and said he did not know where Azalea was; that he did not know anything about the place. He asked me how far I lived from Hickory, and I told him twelve miles. He tore off three blanks for telegrams, and he told me to take them home and tell those people to fill them out. I took them home and gave them to my mother, and told her where he said to fill them out, and what to put in. Foster just told me to take the blanks home and tell those people to fill them out to go where we wanted them to—to Swannanoa, Biltmore or Asheville. There was no other conversation about the place to send them or about what was the place. After I reached home I gave the blanks to my mother, and told her he said he could not send the message to Azalea, that he did not know anything about the place. I told her he showed me where to fill it out, where to put the names and where it was to go. She and my sister filled them out after I showed her, and I went to get another horse. I got Jake Heffner's horse and went back home, and they had the telegram waiting. I took them and started back to Hickory. I got there about three o'clock in the afternoon, went to the telegraph office and gave the two papers to Foster. Foster looked at them and said, 'these are not right yet.' I told him my mother had never written telegrams or had anything to do with it, and she did not know how. He said that it did not make a damn bit of difference; that they were not responsible for her ignorance. I asked him if he could telegraph to Asheville, and he said, 'I guess so, but how far is it from this place, Swannanoa, to where he is?' I told him I thought it was three or four miles. He said it would cost twenty-five cents or seventy-five cents a mile to get the message to my father. I told him it did not make any difference what it cost; that I had the money to pay for it, and it had to be sent. He said the wires were down, and that they did not have a damn bit more sign of a wire than I had. I had ten dollars in money, one five dollar bill and the other in one dollar bills. My mother gave it to me that morning when I left home. After Foster told me that he did not have any wire, I went out and went home. I did not see Foster any more, and carried Exhibits 'A' and 'B' back home with me. I reached home a little before sundown. Foster read both Exhibits 'A' and 'B.' The paper which I carried to Foster the first time I went to the telegraph office in Hickory that morning was carried back by me, and about the last of the next week I gave it to my father, N. M. Cordell. I have not seen it since that time and do not know where it is now."

The telegrams referred to in the testimony as Exhibits A and B, were in the following words:

"4 September, 1907.

"To Danel Cordell. Tell Noah Cordell to come home at once. Message to be returned for comparison.

"Swannanoa.

"To Danel Cordell. Tell Noah Cordell to come home at once.

"Swannanoa.

"4 September, 1907.

"To Danel Cordell. Tell Noah Cordell to come home this evening, that his child is just alive. Message returned for comparison.

"Biltmore.

"The child died Wednesday, and was buried on Thursday evening, 5 September, 1907."

Feme plaintiff was asked: "Why did you bury him on Thursday?" She answered: "The doctor advised me to do it—he had the fever." "What was the condition of the rest of your family?" "I had another sick child." "How many children have you?" "Eight living children." To each of the foregoing questions and answers defendants duly excepted. Two trains passed Swannanoa, Biltmore and Azalea each day, going towards Hickory. Plaintiff's husband reached home Saturday, when he first learned that his child was dead. He testified that he would have gone home at once if he had received the telegram. Defendant demurred to the evidence. Demurrer overruled and defendant excepted. Defendant submitted a series of special instructions presenting the same questions raised by the demurrer, all of which were refused, and defendant excepted. The following issues were submitted to the jury:

1. Did plaintiff tender to the defendant for transmission and delivery the said message mentioned in the complaint? Answer: "Yes."

2. Was the said message in such form that it was the defendant's legal duty to receive it? Answer: "Yes."

3. Did the *feme* plaintiff tender or offer to pay or guarantee the charges for the transmission and delivery of said message? Answer: "Yes."

4. Did the defendant unlawfully refuse to receive and transmit and deliver the said message? Answer: "Yes."

5. Did the *feme* plaintiff suffer mental anguish by reason of the defendant's failure to receive, transmit and deliver said message? Answer: "Yes."

6. What damages, if any, is the *feme* plaintiff entitled to recover? Answer: "Yes, damages $1,250.00."

His Honor's instructions to the jury are set out in full. Defendant noted a number of exceptions. Judgment was rendered upon the verdict and defendant appealed.

Hufham & Whitener and *W. A. Self* for plaintiff.
Tillett & Guthrie and *A. A. Whitener* for defendant.

CONNOR, J. A large number of exceptions and assignments of error are set out in the record, but counsel concede that the merits of the case may be discussed and disposed of without specific reference to each of them. The contention of the defendant involves three propositions: 1st. That the evidence discloses no cause of action; 2nd, that if any cause of action is shown, only nominal damages can be recovered; 3d, that his Honor committed error in admitting testimony upon the fifth and sixth issues. The evidence does not disclose a breach of contract, but refusal to enter into a contract to perform a public duty, to receive for transmission messages set out in the record. The right of the *feme* plaintiff, therefore, to maintain her suit depends upon the answer to the inquiry whether the defendant owed her the duty to receive for transmission the messages tendered it. That a telegraph company is engaged in a public business, owing a public duty to serve any member of the public who may apply to it for service in its corporate business, in conformity to its reasonable rules and regulations, is not an open question in this or any other American court. When, therefore, a person presents a message at one of its offices during office hours, to which there is no lawful objection, and pays or tenders the usual charges therefor, it is the duty of the company's operator, or other agent, to receive and promptly transmit it. A refusal to do so without legal excuse, is an actionable tort, for which such person may recover all such damages as proximately flow therefrom. This right of action is not based upon contract, but upon a breach of duty. This Court, in discussing the cases wherein the plaintiff has sued for damages for failure to deliver, after a contract has been entered into, has uniformly recognized this principle. In *Laudie v. Tel. Co.*, 124 N. C., 528, *Douglas, J.*, said: "Moreover, the defendant, as a common carrier, owed to the plaintiff a public duty which it should have performed with reasonable care and diligence. It cannot be relieved of liability for the proximate results of its own negligence, if it existed, by unreasonable regulations or technical objections." In *Green v. Tel. Co.*, 136 N. C., 489, the same Justice says: "A telegraph company is a quasi-public corporation—private in the ownership of its stock, but public in the nature of its duties. . . . Hence it follows, both upon reason and authority, that the failure of a telegraph company to promptly and correctly transmit and deliver a message received by it, is a breach of public duty imposed by operation of law." In *Tel. Co. v. Biehaus,* 8 Ind. App., 246, 4 Am. Elec. Cas., 723, it is said: "Telegraph companies are quasi-public corporations and are, under the general duty they owe to the public, required to transmit and deliver any message given to them for that purpose, on the payment or tender of the usual charges, with reasonable diligence." Joyce on Elec. Law, sec. 733, says: "If a message is tendered to a telegraph company with the requisite lawful charges, it is obligated to receive the same for transmission." Jones on Tel. Co.'s, sec. 266. In *Gray v. Tel Co.,* 87 Ga., 350, 27 Am. St. Rep., 260, 14 L. R. A., 95, *Bleckley, C. J.,* says: "Telegraph companies, like common carriers, are voluntary servants of the general public. They exercise a public employment and offer themselves for the transaction of business, in behalf of every person who seeks to engage their skill and their special facilities for a peculiar class of work. Their relation to the public imposes upon them the duty of undertaking, as well as the duty of performing, and the violation of either duty is a misfeasance—a tort."

It was the manifest duty, therefore, of the defendant's operator to receive for transmission the message tendered by plaintiff's son, unless excused or justified for its refusal by reason of something found in the evidence taking the message out of the general rule. There is no suggestion that the time, manner of tendering or the contents of the messages were not in accordance with the rules and regulations of the company, or that the charges were not tendered. But two objections were made to receiving them. It is said that they were not properly addressed. The testimony shows that the *feme* plaintiff first sent her son from her home, twelve miles distant, at midnight, with a piece of paper on which some words were written. He reached the office at six o'clock in the morning and offered the message to the operator. It is evident that, in her efforts to write a message, she gave notice to the operator that she wanted to notify her husband, at Azalea, of the extreme illness of her child. The son says that the operator "took up the paper and looked at it, and he said he did not know where Azalea was; that he did not know anything about the place. He asked me how far I lived from Hickory. I told him twelve miles." It is a reasonable inference that the operator was put upon notice that the message was urgent, and that it was to go to Azalea. It would not seem unreasonable to say that he should have aided the boy in putting the message in proper form to send. Instead of doing so, he gives him three blanks and sends him home—a distance of twelve miles—telling him "to tell those people to fill them out." The boy returned home, gave his mother the blanks and "told her where he said to fill them out and what to put in." She, with the assistance of her daughter, "filled them out," while the son borrowed a horse from a neighbor and returned to Hickory to make a second attempt to communicate with his father. When he showed the message to Foster, his only response was: "These are not right yet." The boy's account of the conduct of the operator exhibits an indifference not only to his duty, but to the dictates of common humanity. He made no offer to correct the message, put it in proper form, or to understand its terms. It is perfectly obvious that, by the use of ordinary intelligence, he could, in the light of the first visit of the son and the language used by him, have easily understood that one of the messages was to be sent to Swannanoa and the other to Biltmore. To question this is to impute to him a degree of ignorance unfitting him to hold the position which he occupied. Hickory is a town of several thousand inhabitants; it is unthinkable that the defendant company employed an operator there who did not know from the message, and the action of the boy, that the plaintiff wished to send a message to Daniel Cordell at the places named, directing him to notify her husband to "come home at once"—that "his child was just alive." Instead of putting the message in proper form, if it was not so, or aiding the boy in doing so, or sending it as it was written, he contents himself, when told by the boy that his mother "had never written telegrams," with the declaration that it did not make a bit of difference, that they were not responsible for her ignorance. The entire evidence shows a cruel, wanton disregard of duty, and indifference to the rights of plaintiff.

It is said that the messages were not signed. This is not necessary unless the contents indicated some unlawful purpose or were calculated to arouse a well grounded suspicion that there was some improper reason for withholding a signature. While there are limitations upon the duty of telegraph companies to receive messages in cipher, or containing libelous matter, or disclosing an unlawful design, there was nothing in these messages bringing them within such limitations. Whether, when a message is offered which, by reason of the ignorance of the sender, is not in proper form, but the meaning of which is clear, it is the duty of the operator to aid or advise him how to put it in proper form, so far as to express his meaning, is not presented in this appeal. It would seem to be a reasonable requirement. The operator in this case made no offer or suggestion to the boy to aid him, although both the language of the message and the statement of the boy clearly indicated to him what plaintiff wished and was endeavoring to do. As if to rid himself of the boy, he said that it would take "twenty-five or seventy-five cents a mile to get the message to his father." The boy promptly met this objection by saying that it did not make any difference what it cost, that he had the money to pay for it, and it had to be sent. He did have the money. The operator thereupon said that the wires were down. Baffled in his efforts to send the message, the boy "went out and went home." We are unable to find a semblance of excuse for the refusal of the operator to send the messages. Can it be doubted that if sent to either Biltmore or Swannanoa, exactly as they were written, and, if received by Daniel Cordell and communicated to the husband, that he would have understood their meaning? That the words "come home at once" or "come this evening, your child is just alive," would have brought him promptly to his wife in distress? He says that he would have gone to her. Certainly the operator had no right to assume that the message, as written, would not have accomplished their purpose. "The sender is assumed to know the name of the party to whom he desires the message to be sent, where he resides, and that he has written this accurately and correctly on the telegram." Jones, Tel. Co., sec. 303. What possible difference can it make if the address is written on some other part of the blank than is usual? If a letter was addressed as these messages, is there any doubt that it would have been forwarded to Swannanoa or Biltmore? To hold that every person sending a telegraphic message must have the same experience and use the same degree of intelligence, would be to exclude many who have had no such experience from the benefit of this public agency. Especially would this result follow in many cases if the operator may fix his own standards of the form of a message, refuse to act upon any other information and refuse to perform the service, as in this case, because "he was not responsible for the ignorance" of the sender. It is evident from the language used by the operator that he knew that the messages were to go to Swannanoa and Biltmore. Considered from any point of view, or in any aspect, the defendant was guilty of an aggravated breach of duty to *feme* plaintiff. She is entitled to such damages as proximately resulted from its wrongful refusal to receive her messages for transmission. It is not a negligent failure to perform the terms of a contract, but a tort, with many elements of aggravation.

Plaintiff is entitled to recover, at least, compensation for any injury which she sustained by reason of the tortious conduct of defendant.

The rule prescribing the measure of damages for breach of contract, as laid down in *Hadley v. Baxendale,* 9 Exch., 341, cited and applied in *Williams v. Tel. Co.,* 136 N. C., 84, has no application here. If the defendant had undertaken to transmit and deliver the messages promptly and had negligently failed to do so, we would inquire what damages were reasonably within the contemplation of the parties, as in Williams and similar cases. Here the defendant's liability is measured by the rule laid down in *Ramsbottom v. R. R.,* 138 N. C., 38, and *Johnson v. R. R.,* 140 N. C., 574. "Every man, in law, is presumed to intend any consequence which naturally flows from an unlawful act, and is answerable to private individuals for any injury so sustained," citing *Welch v. Piercy,* 29 N. C., 365. "There need not be in the mind of the individual whose act or omission has wrought the injury, the least contemplation of the probable consequences of his conduct; he is responsible therefor because the result proximately follows his wrongful act or non-action." 1 Sutherland, Dam. 16. "The real question in these cases is, did the wrongful conduct produce the injury complained of, and not whether the party committing the act could have anticipated the result." Hale on Damages, 36, 8 Am. & Eng. Enc. (2nd Ed.), 625; *Allison v. Chandler,* 11 Mich., 561. The defendant may not say that its operator did not anticipate that his refusal to receive and transmit the message would cause the *feme* plaintiff mental anguish. The message gave him notice that mental anguish would follow the failure to receive for transmission. The unusual efforts made to have it sent, the offer to prepay all charges, and all of the surrounding conditions, must have impressed a man of ordinary intelligence with the urgency of the message. He knowingly and wilfully refused to send the messages, and his employer is liable for such damages as plaintiff sustained by reason thereof.

But defendant says that it is not shown that if the message had been sent, that Daniel Cordell would have received it, or that, if he received it, that he would have notified plaintiff's husband. It is more than probable that if it had discharged its duty at Swannanoa or Biltmore, the message would have reached Daniel Cordell. Whether it would have done so was not for the defendant to say, but for the jury. If Daniel Cordell, the uncle of Noah, had received the message, he certainly could have delivered it or notified Noah. He lived one mile from Berea Church, where Noah was teaching music and boarding about in the neighborhood. Whether he could and would have done so was for the jury to say. There was ample evidence to carry these questions to the triers of the fact. They had a right to assume that defendant's agents at Biltmore or Swannanoa would perform their duty, using due and reasonable diligence to deliver, and it was entirely competent for them to find that, by such diligence, a delivery would have been made. They may have reasonably found that Daniel Cordell could and would have promptly notified Noah. There was evidence that two trains each day passed the stations going to Hickory, on the same line of track and not far distant. These questions were submitted to the jury, under correct instructions; that the *feme* plaintiff suffered mental anguish by reason of the absence of her husband, is not only proven, but so manifest that the jury could not have found otherwise.

Defendant assigns as error the admission of the testimony in regard to the burial of the child on Thursday. We can see no basis of complaint. It may have been suggested that she should have waited a longer time for her husband to get home. To meet this, it was competent for her to say why the burial was on Thursday.

She was permitted to say that she had another sick child, and that she had eight living children. To this defendant excepts. We do not perceive how this evidence could prejudice defendant. It was, at the most, immaterial. We have examined his Honor's instructions with care.

It would seem that the second and fourth issues involved questions of law. If so, the jury have answered them correctly.

We find no error in the instructions given the jury. The findings of fact establish plaintiff's cause of action, and that she sustained damage, the amount of which has been fixed by the jury. It will be certified to the Superior Court of Catawba County that there is

No error.

W. H. WHITE v. J. J. KINCAID, KINCAID LUMBER & VENEER COMPANY et al.

(Filed 16 December, 1908).

1. **Corporations—Damnum Absque Injuria.**

   When a person, corporate or individual, is doing a lawful thing in a lawful way, his conduct is not actionable, though it may result in damage to another, for no legal right has been invaded, and hence it is *damnum absque injuria.*

2. **Corporations—Dissolution—Statute—Directors—Rights of Stockholders—Injunction.**

   Revisal, sec. 1195, enters into every charter of a corporation subject to its provisions, and every stockholder in such corporation takes and holds his stock subject to the power of dissolution therein provided; and when the statutory provisions are complied with and the directors, acting in good faith and according to their best judgment for the interests involved, pass the resolution required, and it is concurred in by two-thirds in interest of the stockholders, it is only in rare and exceptional instances that their action should be stayed or interfered with by the courts.

3. **Corporations — Dissolution—Statute—Directors—Fiduciary Relationship.**

   The directors of a corporation in proceedings for dissolution, under Revisal, sec. 1195, are trustees in the sense that they must act faithfully in their judgment for the benefit of the corporation and in furtherance of its interest, and not for the purpose of unjustly oppressing the holders of the minority stock, or to attain their own personal ends.

4. **Corporations — Dissolution — Statute — Injunction — Directors— Discretion.**

When a corporation lawfully proceeds to wind up its affairs in accordance with Revisal, sec. 1195, the motive prompting the act, however reprehensible or malicious, is not, as a rule, relevant to the inquiry; and the courts will not undertake to interfere with the honest exercise of discretionary powers vested by statute in the management of a corporation, however unwise or improvident it may seem in a given instance.

5. **Corporations — Dissolution — Statute—Rights of Stockholders — Injunction—Fraud.**

When it appears of record that a restraining order has been issued against the dissolution of a corporation according to the provision of Revisal, sec. 1195, at the suit of a stockholder, and that there was no scheme or conspiracy on the part of the management or majority stockholders of the corporation to oppress the plaintiff, except an inference made by him from the fact that a dissolution was resolved upon; and that, though solvent, there was no available capital with which to resume business, and no prospect of mutual co-operation or eventual success, the restraining order should be dissolved.

6. **Corporations—Dissolution—Statutes—Questions for Court—Procedure.**

Upon the dissolution at the final hearing of an order restraining a manufacturing corporation from dissolving according to the provisions of Revisal, sec. 1195, in an action brought by a stockholder, when it appears that there are substantial issues involving the adjustment of corporate affairs arising from the pleadings, especially as to indebtednesses between the corporation and plaintiff and defendant, which will require decision by the Court, the proceedings referred to and contemplated by Revisal, sec. 1203, should be carried on and completed in the present action, and include such orders as to the disposition and sale of the plant as may be for the best interests of the assets and of the parties.

CAUSE heard on return to preliminary restraining order, before *Webb, J.*, holding courts Tenth District, on 1 October, 1908.

The plaintiff, using his complaint filed in the cause as an affidavit, alleged, among other things, that he owned two thousand dollars of stock in defendant company, a corporation, having nineteen thousand dollars of paid up stock, owning a valuable plant and owing not more than twenty-eight hundred dollars. Plaintiff also alleged certain wrongs committed in the control and management of the plant on the part of one of the defendants, J. J. Kincaid, the manager and owner of one hundred and forty shares of stock; and avers, further, that he and the individual co-defendants had made a combination and entered on a scheme to dissolve the corporation for the purpose of ousting plaintiff from his office as Secretary and Treasurer, and impairng the value of his holdings, by selling out the property at a time and in a manner that would result in a sacrifice of the same, and cause great damage to the corporation and the holders of stock therein, etc. Plaintiff alleged, further, that the corporation is solvent, and was prosperous until the last several months, when, owing to the panic, the furniture mills of the county had closed down or were working on shorter time, and this condition of affairs had made it advisable for defendant company to suspend operation temporarily, but there was every reason to believe that, with the revival of business, now probable and imminent, defendant company could resume and, under proper management, become a money-making enterprise.

The individual defendants answered and admitted that the plant was now closed down, and alleged that its indebtedness is much greater than plaintiff states, filing an itemized statement of accounts and claims against it; that, while the corporation is now solvent, there are no present means available for further operations. Defendants further admit that, under sec. 1195, Revisal, the defendants, directors, acting in their best judgment, and believing it advisable and most for the benefit of the corporation that the same be dissolved, had passed resolutions to that effect; and, having issued proper notices for the stockholders to meet and consider and pass upon this resolution, as required by the statute, the said stockholders were proceeding to act under the notice when they were stayed by restraining process of the court issued in this cause. Defendants deny that there has been any scheme or purpose to wrong the plaintiff or deprive him of his property, or to wrong or injure the corporation, or the holders of the stock therein, either by reason of the dissolution or the disposition of the property, but aver that the property is to be sold by methods calculated to make it bring its value, and where plaintiff, and all others, shall have an opportunity to bid and buy; that defendant J. J. Kincaid is the only member of the company who has any experience in this work, and he desires to withdraw and go into the business in the eastern part of the State, and, taking all the conditions and circumstances into consideration, the directors, deeming it to the best interest of the corporation and its stockholders that it should be dissolved, have passed the resolution to that effect, as heretofore stated.

Plaintiff replied, denying the amount of the indebtedness claimed, averring mismanagement, etc., on the part of defendant J. J. Kincaid, as stated. On the hearing the preliminary restraining order was dissolved, and the plaintiff excepted and appealed.

T. C. Linn, Adams, Jerome & Armfield for plaintiff.

L. H. Clement, Hayden Clement, Overman & Gregory for defendant.

HOKE, J., after stating the case: Our statute on the subject, Revisal 1905, sec. 1195, provides for the voluntary dissolution of corporations, in effect, as follows: "That whenever, in the judgment of the board of directors, it shall be deemed advisable and most for the benefit of a corporation that it should be dissolved, they may pass a resolution to that effect by a majority of the board, proper notice being first given as required, and when this resolution has been submitted in writing to the stockholders, and, in a meeting called for the purpose, two-thirds in interest of the stockholders consent to such dissolution, and the action is filed with the Secretary of State, who shall issue a certificate to that effect, and after due publication of notice in the county, and this having been made to appear to the Secretary, the corporation shall be dissolved and its business affairs settled up and adjusted as required by law."

As far as North Carolina is concerned, this statute settles the question formerly much mooted in the courts as to whether, and under what circumstances, a corporation could be dissolved by the stockholders, when no time was fixed for its duration, upholding and extending this power of voluntary dissolution as established by the better considered decisions on the subject. *Black v. Canal Co.*, 22 N. J. Eq., 130-404; *Treadwell v. Salisbury Mfg. Co.*, 7 Gray, 393. This regulation enters into every charter, subject to the provisions of the statute, and unless otherwise enacted by the Legislature, every stockholder takes and holds his stock subject to this power of voluntary dissolution, by resolution of the directors concurred in by two-thirds in interest of the stockholders. This being the law governing the interest of these parties, when the board of directors of a corporation have determined, in the exercise of their best judgment, that the corporation be dissolved, and are pursuing the methods specified by the statute, it is only in rare and exceptional instances that their action should be stayed or interfered with by the courts. It is a principle well established, that when a person, corporation or individual is doing a lawful thing in a lawful way, his conduct is not actionable, though it may result in damage to another; for, though the damage done is undoubted, no legal right of another is invaded, and hence it is said to be *damnum absque* *injuria. Dewey v. R. R.,* 142 N. C., 392; *Thomason v. R. R.* (plaintiff's appeal), 142 N. C., 318; *Oglesby v. Attrill,* 105 U. S., 605. In such cases the motive prompting the act, however reprehensible or malicious, is not, as a rule, relevant to the inquiry; nor will courts undertake to interfere with the honest exercise of discretionary powers vested by statute in the management of a corporation, however unwise or improvident it may seem. *Windmuller v. Distilling Co.,* 114 Fed., 491.

It is true that, both before and since the enactment of this statute, there is a salutary principle very generally recognized and upheld by well considered decisions, that the directors of these corporate bodies are to be considered and dealt with as trustees, in respect to their corporate management; and that this same principle has been applied to a majority or other controlling number of stockholders, in reference to the rights of the minority or any one of them, when they are as a body in the exercise of this control, in the management and direction of the corporate affairs, *Farmers Loan and Trust Co. v. R. R.,* 150 N. Y., 410; and certainly this is true when the majority or controlling number of stockholders are exercising their authority in dictating the action of the directors, thereby "causing a breach of fiduciary duty." *Robotham v. Insurance Co.,* 64 N. J., Eq., 672-689. And while these decisions have been more frequently made in reference to some assignment or disposition of the corporate property or assets, whereby the corporation is disabled from performing its work, and is necessarily retired from active business, this same principle applies, in a restricted degree, when the action complained of is a voluntary dissolution, according to the methods provided by law. In these cases also, if it clearly appears that the action of the management is in bad faith, that the resolution for dissolution, for instance, has been superinduced by fraud or undue influence, or if it could be clearly established that this resolution was not taken for the benefit of the corporation, or in furtherance of its interest, but for the mere purpose of unjustly oppressing the minority of the stockholders or any of them, and causing a destruction or sacrifice of their pecuniary interests or holdings, giving clear indication of a breach of trust, such action could well become the subject of judicial scrutiny and control. *Treadwell v. Copper Co.,* Appel. Div. Supreme Court N. Y., 613; *Elbogue et al. v. Gergereau Flyn Co.,* 62 N. Y. Supp., page 287; *In re London Mercantile and Dis. Co.,* 1 Eq. Cas. L. R. 1865-66, page 276; *In re Beaujolias Mill Co.,* 3 Chan. App. Cases, L. R. 67-68, page 13.

Such cases almost invariably arise when the management of a solvent concern, going and prosperous, ceases operations and determines to dissolve and sell out, with a view of continuing the same or similar business, under different control, and when there is indication given that the sole purpose was to oppress some of the stockholders and confiscate their holdings, or when it is done in furtherance of some scheme to promote the pecuniary interest of the actors and to the detriment of the corporation, giving indication of a breach of trust on the part of the authorities in charge and control of the corporate affairs.

But no such facts are presented here. There is no testimony offered of any scheme or conspiracy on the part of defendants to oppress the plaintiff, except an inference made by him from the fact that a dissolution was resolved upon. While the company is now solvent, it has not been running for several months, because the returns were not satisfactory, and the prospect of a change in this respect only rests in surmise. There is some dispute as to the amount of indebtedness, nor does there seem to be any capital ready and available, with which to resume operations in case such a course would be determined upon; and, from the allegations made by the parties, their attitude towards each other does not give promise of mutual co-operation or eventual success. On the evidence, therefore, and in a case of this kind we are permitted to act on the evidence, the Court is of opinion that the restraining order was properly dissolved, and that, on the facts as they now appear, the contemplated dissolution should be allowed to proceed.

While we are of opinion that the order restraining the dissolution of the defendant corporation was properly dissolved, we do not think, even if our present disposition of the question should prevail at the final hearing, that the action should be dismissed. In such case, or before that time, if the directors and stockholders see proper, or deem it prudent, to act in advance of a trial, the dissolution should proceed under the methods provided by the staute. But there are, as stated, substantial issues arising in the pleadings, more particularly as to the indebtedness, both between plaintiff and defendants and between the individual defendants and the corporation, which will require decision by the Court. And, while by sec. 1201 of the statute, the directors, unless otherwise determined by order of some court having jurisdiction, are made trustees with power to settle or wind up the corporate business, under sec. 1203, this entire matter of winding up the business after dissolution may be taken charge of by the Court, and must be at the instance of either the creditors or stockholders, or any one of them. And matter clearly arising in this action being in part incident to the proper winding up and adjustment of the corporate affairs, and necessary to be determined, there seems to be no reason why, if dissolution is to be had, the proceedings referred to and contemplated in sec. 1203, should not be carried on and completed in this action, and this will include such orders as to the disposition and sale of the plant as may be for the best advantage of the assets and the best interest of the parties.

There is no error, and the judgment below is

Affirmed.

REID and BEAM v. SOUTHERN RAILWAY COMPANY.

(Filed 16 December, 1908).

1. **Carriers of Goods—Penalty Statutes—Regular Stations—Refusal to Accept Shipment.**

A refusal by the carrier's agent to receive, at its depot, freight, and transportation charges therefor, destined for a point on the carrier's road which was only a siding, and was not a regular station, is wrongful, and subjects the carrier to the penalty prescribed by Revisal, sec. 2631, when the refusal is on the ground that the agent did not know where the given destination was, and it appears that he could have ascertained that freight was ordinarily shipped there on way bills made out to a regular station on the carrier's road some two miles distant therefrom.

2. **Same—Evidence.**

When a shipment of freight and transportation charges are refused by carrier's agent because he did not know where its given destination was, and it appears that the name given was very slightly changed from that appearing on the "Official Railway Guide and Shipping Guide" used by the carrier; the fact that another agent, who afterwards took the place of the first, promptly learned the location of the destination and the rate, and gave bill of lading and made shipment, is evidence that the rate and destination could have been ascertained by the first from the information given him, in an action for the penalty prescribed by Revisal, sec. 2631.

3. **Carriers of Goods—Penalty Statutes—Refusal to Accept Shipment—Commerce Clause—Constitutional Law.**

The penalty arising under Revisal, sec. 2631, from the wrongful refusal of carrier's agent to accept an interstate shipment of freight, bears no relation to the Commerce Clause of the Federal Constitution, for the penalty accrues before the freight is accepted for transportation.

4. **Carriers of Goods—Penalty Statutes—Refusal to Accept Shipment—"Party Aggrieved."**

The shipper of the goods is the "party aggrieved," and is the one entitled to sue for the penalty prescribed in Revisal, sec. 2631, which arises from the wrongful refusal of the carrier's agent to accept them for transportation.

ACTION tried before *Ward, J.*, and a jury, April Term, 1908, of RUTHERFORD. Plaintiff appealed.

Edwards & Elliott for plaintiffs.
W. B. Rodman and *Gallert & Carson* for defendant.

CLARK, C. J. Action for penalty under Revisal, sec. 2631, for refusal to "receive for transportation" a carload of shingles tendered to defendant's agent at Rutherfordton, 2 July, 1906, for shipment to consignee at Scottsville, Tenn. The plaintiff testified that he tendered prepayment of freight, and repeatedly, on many succeeding days, asked that the car be shipped, and offered to prepay freight. The agent refused to ship because he said he did not know where Scottsville was, nor the rate. The plaintiff told the agent that Scottsville was near Knoxville, which is a station on defendant's road. On 17 July, a new agent came to Rutherfordton, he had a talk with plaintiff about the carload of shingles, and on 18 July, wired an inquiry to the division freight agent, who the same day wired back the rate, and the car was sent forward on 19 July. It appeared by testimony of defendant's witnesses that Scottville, instead of Scottsville, is the name of the station, that it is a siding a few miles from Knoxville on a branch road operated by the defendant, that it is not a regular station, but freight is usually shipped there on way-bills made out to a regular station two miles away. On 19 July, the defendant shipped the car on a way-bill to "Scottsville, Tenn.," the freight being prepaid. The name "Scottsville, Tenn.," does not appear in the "Official Railway Guide," nor in the "Shipping Guide" used by railroad companies.

The fact that on 18 July, the new agent promptly learned where Scottville, Tenn., was, and the rate, and gave a bill of lading and shipped the carload the next day, is evidence that the rate and destination could have been ascertained by the other agent on 2 July.

The defendant contends, however, that Revisal, sec. 2631, giving a penalty for refusing to accept freight for shipment is unconstitutional when the freight is to be shipped into another State. But "refusing to receive for shipment" is an act done wholly within this State. It is not part of the act of transportation, and our penalty statute applies. This was held by Avery, J., in *Bagg v. R. R.,* 109 N. C., 279, where the railroad company received the freight for shipment to a point in another State, but negligently detained it for five days before shipping. The precise point herein was raised in *Currie v. R. R.,* 135 N. C., 536, and it was held that this section, giving a penalty for failing and refusing to accept for shipment a carload of lumber, was not unconstitutional as an interference with interstate commerce, when the lumber was offered for shipment to a point in another State. Both these cases were cited and reaffirmed by *Walker, J.,* in *Walker v. R. R.,* 137 N. C., at p. 168.

In *Twitty v. R. R.,* 141 N. C., 355, it was held, *Brown, J.,* that where the agent held the freight in storage, but refused to give a bill of lading because he did not know the freight rates, this was "a refusal to receive for transportation, and the railroad company is liable to a penalty under Revisal, 2631." The Court said, "The fact that the agent did not know the freight rates is no excuse. It is his duty to know them. At least, he could readily have telegraphed and ascertained, and need not have refused to give a bill of lading on that account."

In *Harrill v. R. R.,* 144 N. C., 532, *Walker, J.,* it was held, that Revisal, sec. 2633, imposing a penalty for failure to deliver freight was valid, though the freight was interstate. There the penalty was incurred after the transportation had ceased. Here the penalty accrued before the transportation had begun, and before the freight was even received and accepted for transportation.

The owner of the shingles is the proper party plaintiff. There was no consignee till after the bill of lading was given. That the State Court has authority in such cases is now well settled. Cooke, Commerce Clause, 233, citing *R. R. v. Jacobson,* 179 U. S., 287, and many other cases.

The fact that Scottville was not a regular station at which was kept an agent is no valid excuse for not receiving the shingles. When goods are shipped to a place where there is a side-track, but no depot platform or agent of the carrier, and this is known to the parties, it has been held that leaving the car of goods upon the side-track is a good delivery, and relieves the company from further responsibility. 4 Elliott Railroads, sec. 1521. That a depot was or was not maintained at Scottville in no way affected the right of the plaintiffs to have their goods received at Rutherfordton when tendered. *Narville v. R. R.*, 67 L. R. A., 271; *Alexander v. R. R.*, 144 N. C., 93.

The judgment of nonsuit is
Reversed.

BROWN, J., concurring: I concur in sending this case back for trial in order that the facts may be found. I reserve the right to determine for myself whether the penalty, in case one should be imposed, is a burden upon interstate commerce, in case the cause shall come back upon a final judgment against the defendant.

As I read the record the defendant would be liable, if at all, for only fifty dollars, the penalty imposed for one day only, as there is proof of only one distinct tender and refusal. That matter, however, will be made clearer on another trial.

As the plaintiffs admit that they lost nothing by the delay in shipping the shingles, if they are permitted to recover seven hundred and fifty dollars as penalties under the statute, I should be inclined to hold that such an excessive impost could not be sustained, under the decisions of the Supreme Court of the United States in *Houston & T. C. R. R. v. Mays*, 201 U. S., 321, and *McNeil v. R. R.*, 202 U. S., 542.

C. E. BULL v. ATLANTA AND CHARLOTTE AIR LINE RAILWAY COMPANY.

(Filed 16 December, 1908).

1. **Negligence — Contributory Negligence — Instructions — Verdict, Facts Established By.**

   When the question of defendant's negligence is dependent upon whether the engineer stopped the train in an unusually rough or jolting manner, and the court charges the jury to find the appropriate issue for defendant if the engineer stopped it in the usual or ordinary manner, a verdict in plaintiff's favor establishes the defendant's negligence; and, further, when the Court charges the jury to answer likewise in defendant's favor if the plaintiff did not take all ordinary precautions to protect himself against all shocks or jolts, a verdict in plaintiff's favor clears him of contributory negligence.

2. **Same—Irrelevant Questions—Harmless Error.**

   When it has been established by the verdict of the jury, that, through defendant's negligence, without contributory negligence on plaintiff's part, plaintiff was thrown from the top of a car and injured, the burden being on plaintiff, his having introduced immaterial evidence relating to a defective brake wheel, upon which he was thrown, is harmless error, as the questions arising therefrom could not affect the result.

ACTION tried before *Moore, J.*, and a jury, April Term, 1908, of MECKLENBURG. Defendant appealed.

The plaintiff in this action was a conductor upon a freight train of the Southern Railway Company, running between Greenville and Charlotte. This freight train carried passengers in the caboose car, and on the occasion in question a passenger boarded the train at Belmont. He did not inform any one where he was going when he got on the train, but when the conductor collected his fare he found that the passenger desired to alight at Juneau, which is a flag station. It was the duty of the engineer when approaching these flag stations to blow the station signal, and then it was the duty of the engineer to watch for a signal from the conductor as to whether the train was to be stopped at the flag station.

There was evidence tending to show that the engineer failed to blow the station signal, and the conductor, perceiving that the engineer was not blowing the station signal, attempted to give the engineer a signal, first from the window of the caboose. Failing in this, he got on top of the freight car in front of the caboose, and then again attempted to signal the engineer, but not being able to attract his attention, the conductor attempted to go forward and turn on the air-brakes, which was a means of stopping the train. He discovered, however, that there were no air-brakes close enough for him to reach, and he started back towards the caboose car, still signaling the engineer. About this time the engineer seems to have discovered the signal, and he then stopped the train in such a way as to cause (as plaintiff alleges) an unnecessary and unusual shock, and this threw the plaintiff from the top of the box-car down between the box-car and the caboose car, and in his fall he grabbed at a brake wheel which broke with him, and he then fell between the cars and had his leg crushed to pieces, and his right hand mangled so that he lost three fingers, and sustained other severe bruises and cuts on his body.

By the uncontradicted evidence, the brake wheel in question was in a defective condition, having lost two of its spokes, and this defective condition had been reported two or three times to the car inspector, but the defendant had failed to repair the wheel.

Tillett & Guthrie for plaintiff.
W. B. Rodman for defendant.

CLARK, C. J. The Court instructed the jury: "You will understand that the plaintiff contends that there was a series of negligent acts of which the Southern Railway Company was guilty, and which resulted in the injuries which he sustained." And after enumerating these several alleged acts of negligence, the Court again says: "He contends that the series of negligent acts complained of proximately caused the injuries which he says he received." In other words, the plaintiff took upon himself the burden of showing that each one of these acts in this series of acts was negligent.

The Court on the first and second issues charged: "If the jury find from the evidence that, as the train approached the station, Juneau, the plaintiff was sitting in the cupola of the caboose, and the conductor attempted to signal the engineer from the window of the cupola of the caboose, and failed, and then went out on the top of the caboose and crossed over to a box car to signal the engineer, and did signal the engineer to stop, then it was the duty of the engineer to stop his train at Juneau, in obedience to the order; and if the jury find from the evidence that the engineer, acting in obedience to the signal of the conductor, applied the brakes to the train in the usual and customary manner, and if the jury find from the evidence that the train was going up a grade, and the application of the brakes and the train going up the grade caused the slack to run out, and this caused a jar or jolt, which threw the conductor off of his feet, and he fell between the cars, this would not be negligence, and you will answer the first issue, 'No.' "

From the foregoing charge it is clear that the jury found that the train was not stopped by the engineer in the "usual and customary manner" and with the usual and ordinary jolts, because, under the instruction quoted above, if the jury had found that the engineer had stopped the train in the usual and ordinary manner, without negligence on his part, then the jury would have answered the first issue "No." In the light of this charge, and the verdict of the jury upon the first issue, it may be taken as a fact, which is established in this case without objection or exception, that the engineer on the occasion in question stopped the train with unusual and unnecessary shock, and that there was negligence on the part of the railway company in this respect.

On the first and second issues the Court charged the jury, further, as follows: "When a person enters into the service of a railroad company he assumes all of the ordinary risks of his employment, and when a person becomes the conductor of a freight train he assumes all the ordinary risks arising from the jolts and jars which are incident to the handling of freight trains. The Court charges you, as a matter of law, that if the jury find from the evidence that the plaintiff had signalled the engineer to stop his train, it was his (the engineer's) duty to stop his train, and the fact that the engineer proceeded to stop his train in obedience to the orders of the conductor would not be negligence, unless it was done in an extraordinary and unusual manner. The Court further charges you, as a matter of law, that if the jury find from the evidence that the conductor had signalled the engineer to stop his train, it was the duty of the conductor, who was on top of the train, to be careful, and to take such steps and do all things which a man of ordinary prudence would ordinarily do to protect himself from any shock or jar or jolt which might be expected to occur, and if he did not, then the negligence would not be that of defendant's lessee, but the negligence of the plaintiff himself, and you will answer the first issue 'No,' and the second issue, 'Yes.'"

Here again the jury were distinctly instructed that they should answer the first issue "No," unless they found that the train was stopped "in an extraordinary and unusual manner," and likewise the jury were instructed to find that the plaintiff was guilty of contributory negligence unless it was shown that he took all ordinary precautions to protect himself against any shock or jolt caused by the stopping. Under this instruction the jury have found that the plaintiff himself was not guilty of any contributory negligence in this respect.

Under the charge of the Court, as quoted above, the jury found two facts which are established in the case without objection or exception, viz: (1) That the engineer stopped the train in a manner to cause an unusual and unnecessary shock, and (2) That the plaintiff himself was not guilty of any contributory negligence.

With these two facts established, without objection or exception, then all the other objections and exceptions become harmless to the defendant. For instance, as the jury have found that the railway company was guilty of negligence in causing the plaintiff to be thrown from the top of the box car by the unusual and unnecessary shock, and that this occurred without his negligence, then it follows that the plaintiff was entitled to recover for the damages which he sustained; and the question as to whether the brake wheel was defective, or whether that was an additional cause for his injury, was, in a sense, immaterial, because, even if the brake wheel had not been defective, the plaintiff still would have been entitled to recover what damages he sustained; and if the defendant was guilty of negligence in causing a shock which threw the plaintiff from the top of the box car, it could not save itself by showing that it was not guilty of negligence in respect to the brake wheel. For putting on plaintiff the burden of proving the brake wheel defective the defendant cannot complain. It is not necessary to consider the other exceptions, in this view of the case.

No error.

BROWN, J., dissenting: I concur with my brethren that there was evidence of negligence, upon the part of the engineer, in stopping the train while the conductor was on top of the cars, sufficient to take the case to the jury, but it being admitted by this Court that the condition of the brake wheel had nothing to do with the injury, I think that, in all fairness, a new trial should be ordered, because the Judge plainly submitted that feature of the case to the jury.

The plaintiff, conductor of a freight train, failing to signal the engineer from the caboose, to stop, went out on top of the cars for the purpose of signalling from a place where his signals could be seen. There is evidence tending to prove that the engineer, having knowledge of the plaintiff conductor's position, was guilty of negligence in the suddenness and violence with which he applied his air brakes, whereby he threw plaintiff off the car to the ground, causing serious injury.

The plaintiff in falling struck the brake wheel with his feet and then grabbed the rim with his hands. The rod of the wheel snapped off and the plaintiff fell to the track. There was evidence tending to prove that two spokes of the wheel were out.

I understand it to be admitted by the Court, as it is undoubtedly true, that the condition of the brake wheel is not responsible, for the injury was in no way connected with it, and it was not its proximate cause. But the Court seems to regard it harmless error that his Honor submitted that feature of the case to the jury. I cannot concur in that view. It was extremely prejudicial error.

The negligence of the engineer was disputed. There is evidence tending to prove that he obeyed the plaintiff's orders to stop the freight train as well as it could be done. The defective condition of the brake wheel was placed before the jury repeatedly by the Judge, who gave it a very prominent place in stating plaintiff's contentions, and it was so argued by counsel for plaintiff to the jury. The defendant properly asked the Court to instruct the jury that there is no evidence that the injury was caused by the defective brake wheel appliance. This prayer should have been given. In the complaint and in the evidence the defective brake wheel is made a distinct ground for recovery.

Instead of giving the instruction the Court charged the jury as follows: "The defendant does not deny that the plaintiff fell from the top of the car, on which he was standing immediately before falling, but it contends that he was not thrown from the train at all, or if he was thrown from the train, that the jar or shock which threw him was not an unusual or unnecessary jolt, jar or shock. It does not deny that the plaintiff caught the brake wheel and broke it in falling, but it denies that the brake wheel was defective, and denies that the Southern Railway Company knew or should have known anything about its being defective. It contends, further, that the brake wheel was intended as a means of applying the brakes to the caboose, and was not intended as a protection to employees of the Southern Railway Company in discharging duties required of them on top of the train."

The whole charge shows that the jury might well have been misled by the manifest opinion of the Judge, pervading the whole trial, that the defective brake wheel constituted actionable negligence and was the proximate cause of plaintiff's injury, as alleged in the complaint.

It is impossible to tell whether the jury found the first issue for plaintiff upon the ground that the engineer was negligent in stopping the train, or because of the condition of the brake wheel. Of course, it is well known that brake wheels are not intended to catch two hundred pound men when falling. When plaintiff fell on it his weight snapped it off at the rod, and it would have snapped off just as it did even if every spoke had been in its place in the wheel.

I understand my brethren to admit that, if there be no negligence found except as to the absent spokes in the brake wheel, the plaintiff could not recover. The Judge and counsel for plaintiff, during the whole trial, evidently took the contrary view and regarded such defect as actionable negligence.

It will be seen, also, by reading the record, that the defendant objected repeatedly to the evidence in regard to the condition of the brake wheel as irrelevant, incompetent and prejudicial, and that the admission of it is excepted to and assigned as error.

The jury were evidently misled plainly to defendant's prejudice, and I think there should be a new trial for receiving incompetent evidence and for refusing the instruction asked.

ARMSTRONG, CATOR & CO. v. D. N. LONON.

(Filed 16 December, 1908).

In this case there was evidence of an item of account between plaintiff and defendant, amounting to the sum in controversy, and defendant sent check "in full of account," not inclusive of the amount claimed by plaintiff, which plaintiff received, endorsed and kept the money on. *Held*, evidence sufficient, in this case, of the intent of full payment and discharge to go to the jury.

ACTION, tried before *Ferguson, J.*, and a jury, September Term, 1908, of MCDOWELL, on appeal from a Justice's court.

The action is brought to recover a balance due on verified account of $49.68.

The defendant pleaded a payment of $29.18 on 6 July, 1906, by check, as follows:

"MARION, N. C., 6 July, 1906.

Pay to the order of Armstrong, Cator & Co. $29.18 (twenty-nine 18-100 dollars).

To Merchants & Farmers Bank, Marion, N. C. (In full to date).

D. N. LONON."

The check was endorsed to plaintiffs and duly paid.

The Court submitted this issue to the jury: Is the defendant indebted to the plaintiffs and, if so, in what amount? "No."

From the judgment rendered plaintiffs appealed.

Pless & Winborne for plaintiffs.
J. L. C. Bird for defendant.

PER CURIAM. We have examined the record and exceptions and the Judge's charge in this case, and find no reversible error. There is only one assignment of error relating to the testimony taken or rejected, and that is without merit. The other assignments of error relate to prayers for instruction and to the charge of the Court. There is evidence upon the part of plaintiff, in the deposition of Cator, as well as the evidence offered by defendant, that there was a dispute, or at least some misunderstanding in regard to one item in the account, which amounted to the sum now claimed. The check indicated on its face that it was sent in full payment to date thereof and while this is not, under the circumstances of this case, conclusive, yet the receipt of it by the plaintiffs, their endorsement of it and retention of the money, is sufficient evidence to go to the jury that it was sent and received as a full payment and discharge of all indebtedness of defendant to plaintiffs, and so intended.

In charging the jury we think his Honor followed the principles laid down in *Petit v. Woodlief,* 115 N. C., 125; *Boykin v. Buie,* 109 N. C., 503; *Koonce v. Russell,* 103 N. C., 179; *Pruden v. R. R.,* 121 N. C., p. 511, and in his instructions and those refused we find no error that necessitates another trial.

The case of *Kerr v. Saunders,* 122 N. C., 635, not cited in either brief, is very much in point.

No error.

In the matter of DICK WILLIAMS.

(Filed 16 December, 1908).

1. **Appeal and Error — Habeas Corpus Proceedings — Summary Effect—State's Appeal.**
   The State has no right of appeal from an order releasing a prisoner in *habeas corpus* proceedings, as such proceedings must necessarily be summary to be useful and give the beneficial results intended.

2. **Executive Pardons Upon Condition — Constitutional Right to Grant.**
   The Governor is given the power to grant a pardon upon a condition precedent that the prisoner pay costs of trial; and upon condition subsequent, that he remain of good character, and be sober and industrious. Constitution, sec. 6, Art. 3.

3. **Executive Pardon—Defenses—Procedure.**
   A pardon can only be issued after conviction, and therefore it is impossible to plead it as a bar to the prosecution. The remedy is in *habeas corpus* proceedings.

4. **Executive Pardons—Requisites—Acceptance.**
   An acceptance of a pardon is essential to its operative effect, as a condition may be annexed rendering it more objectional than the offense of which the prisoner was convicted.

5. **Executive Pardons—Requisites—Delivery.**
   The delivery of a pardon is one of its essential requisites; and its delivery to the prisoner's attorney is a constructive delivery to the prisoner.

6. **Executive Pardons— Conditions Precedent and Subsequent — Effect of Acceptance and Delivery.**
   After delivery and acceptance of a pardon with conditions precedent and subsequent, it is irrevocable upon the compliance by the prisoner with the condition precedent, unless he shall violate the conditions subsequent by his conduct after the release.

7. **Same—Return of Pardon by Sheriff.**
   The sheriff, by returning a pardon after its delivery and acceptance by the prisoner, cannot defeat or impair its legal results.

PROCEEDINGS in *habeas corpus,* from BURKE, heard before *Justice, J.,* 9 June, 1908.

The petitioner was duly convicted in the Superior Court of Burke County of the offense of retailing spirituous liquors contrary to law, and was sentenced to six months in jail, and to be worked on the roads of Gaston County. On 2 May, 1908, the governor of the State issued a pardon containing the condition that the prisoner shall "pay all costs in the case and remain of good behavior, sober and industrious." The pardon was delivered by the governor to R. L. Huffman, attorney for the petitioner Williams, with a request, that when the costs in the case were paid to the Clerk of the Superior Court of Burke County, said pardon should then be delivered to the sheriff of Burke County to be forwarded to the sheriff of Gaston County, where the prisoner was at work. The costs were paid, and the pardon forwarded to the sheriff of Gaston County for the prisoner on 4 May, 1908. The pardon was received by said sheriff, but before he delivered it to the prisoner, the governor wired said sheriff not to execute the pardon, that it was withdrawn. The prisoner applied to his Honor Judge Justice for a writ of *habeas corpus*, and upon the hearing was discharged. The State appealed.

Assistant Attorney-General Clement for the State.

Riddle & Huffman, John M. Mull and *John T. Perkins* for defendant.

BROWN, J. The prisoner having been discharged, no practical purpose is to be subserved in prosecuting this appeal, even if the State had such right which, it is plainly intimated in *State v. Miller,* 97 N. C., 452, is not given the State. Proceedings in *habeas corpus,* the object of which is to release a person from illegal restraint, must necessarily be summary to be useful, and if action could be arrested by an appeal upon the part of the State, the great writ of liberty would be deprived of its most beneficial results.

This must be the legislative view, as no provision is made for such an appeal by the State, while an appeal is allowable to either the petitioner or the respondent where the custody of children is involved. As the matter presented is of public interest, we will, however, consider the appeal on its merits.

The power of the governor to grant conditional pardons under sec. 6, art. 3, of the Constitution, is undoubted. The facts agreed show that executive clemency was extended to the petitioner upon a condition precedent, and also a condition subsequent; the first being that he should pay the costs, and the latter being that he shall "remain of good behavior, sober and industrious."

The costs were paid, but whether the petitioner will remain of good behavior, sober and industrious, the future can only determine.

The prisoner cannot plead to the indictment and set up his pardon as a bar to future prosecution, because, under our State Constitution, it can only be issued after conviction. Therefore, its validity can only be tested in a proceeding of this character.

One of the essential requisites to the validity of a pardon is that it must be delivered, and delivery is not complete without acceptance. Inasmuch as the pardon may be conditional, its acceptance is necessary, for it is possible the condition may be more objectionable than the punishment inflicted by the judgment. *U. S. v. Wilson,* 32 U. S., 150.

The principles applicable to the delivery of a deed and those applicable to the delivery of a pardon are analogous. The delivery of both is complete when the grantor has parted with entire control over the instrument with the intention that it shall pass to the grantee, and the latter has accepted it either in person or by his attorney. *Kille v. Edge,* 79 Penn. St., 15; *Redd v. State,* 65 Ark., 475; *Hunnicutt v. State* (Tex.), 51 Am. Dec., 51.

In this case the prisoner sued for the pardon and it was in consequence delivered to his attorney. This is a constructive delivery to the prisoner, and if he complies with the condition precedent the pardon is irrevocable, unless he shall violate the conditions subsequent by his conduct after his release. *Ex parte Reno,* 66 Mo., 260; *Henrichsen v. Hogden,* 67 Ill., 179; *In re DePuy,* 3 Benedict, 307.

The sheriff of Gaston County, to whom the pardon was sent for the prisoner, had no right to return it, as the costs had then been paid and the condition precedent performed. His act was inoperative to defeat or impair the legal effect of the pardon. When it reached him, the executive act of grace was complete, even though it had not been delivered to the prisoner's attorney. *Ex parte Powell, supra.*

We are of the opinion that the prisoner was properly released.

Affirmed.

M. R. RUDISILL v. A. A. WHITENER.

(Filed 16 December, 1908).

1. **Issues—Harmless Error.**

An issue submitted that does not prejudice the rights of the complaining party, though unnecessary, the whole controversy being correctly determined upon another issue, is harmless error.

2. **Deeds and Conveyances—Contracts to Convey—Equity—Fraud or Mistake—Reasonable Relief.**

When the defense to an action for specific performance to convey land is that, as a part of the consideration for the contract, entering into the treaty and forming part of the negotiations, the plaintiff was to give defendant an option on another tract of land, which was not done, the contention does not necessarily involve an allegation of fraud or intentional wrong, but in this case only the question of a reasonably well grounded belief on defendant's part that the option was to be given.

3. **Deeds and Conveyances—Contracts to Convey—Treaty—Negotiations—Written Contract—Parol Evidence—Fraud or Mistake.**

When the written contract to convey lands sued on is admitted to have been signed as written, but the defense is that specific performance should not be decreed, on the ground that the defendant was induced to enter into it by the promise of the plaintiff to transfer to him a certain option on another tract of land he held, which was not done, parol evidence of all the facts and circumstances surrounding the treaty and entering into the negotiation is competent, not to correct the writing, but to enable the Court to ascertain whether there was any element of mistake or unfair advantage in the transaction taken by the party seeking equitable relief.

ACTION tried before *Justice, J.*, and a jury, June Term, 1908, of BURKE.

This cause was before us at Fall Term, 1907, when a new trial was advised (146 N. C., 403). Upon the last trial his Honor submitted the following issues, to which the jury responded as set out in the record:

1. Did defendant, in violation of his contract, fail and refuse to execute and deliver to the plaintiff a deed for the land described in the complaint? Answer: "No."

2. If so, what damage is plaintiff entitled to recover of defendant? Answer: ....

3. Was the defendant, at the time he signed the contract, reasonably induced to believe by the plaintiff, and did he believe, that the option on the Sigmon land would be transferred to him, and did that constitute the inducement to sign the contract? Answer: "Yes."

The plaintiff excepted to the submission of the third issue; upon the ground that such issue was neither material nor raised by the pleadings, and that such action of the Court is error apparent upon the record.

The defendant A. A. Whitener was allowed to testify, over the objection of the plaintiff, as follows: "My agreement was, I was to have the option for $100 or my roughness, and, if I got my option, I was to give them the deed for my land for $2,000; that is what I agreed on, and I have always been ready to give deed if I had got my option, and I am ready to do it now, and so is my wife. I was only selling it to buy the Sigmon place."

At the request of the defendant, the Court gave the following instructions: "If the jury find from the evidence that, when the defendant signed the agreement to convey his farm, he was reasonably induced by the acts and words of the plaintiff to believe that the plaintiff was going to transfer to defendant the option on the Sigmon land, and on account of such belief the defendant signed the contract sued on, then the jury should answer the third issue, 'Yes.'" Plaintiff excepted. There was a judgment on the verdict in favor of the defendant as set out in the record. To which judgment the plaintiff excepted and appealed.

Avery & Irwin and *M. H. Yount* for plaintiff.
A. A. Whitener, W. A. Self and *S. J. Erwin* for defendant.

CONNOR, J. The first issue involved the merits of the controversy, and the answer put an end to the plaintiffs' cause of action. The third issue was not necessary, but we do not perceive how it could possibly prejudice plaintiffs. It was answered by the verdict on the first issue.

The defendant's contention does not necessarily involve an allegation of fraud on the part of plaintiffs. If, as he contends, and the jury found, he was induced to sign the contract to sell by a reasonably well grounded belief caused by plaintiffs, without any intention on their part to mislead him, the Court will refuse specific performance and leave the plaintiffs to their action for damages, if they have sustained any. The jury found, at the first trial, that defendant's refusal did not endamage the plaintiffs. We can add nothing of value to what we said in the first appeal.

It has always been held that, in an action for specific performance, parol evidence will be heard, not to contradict or vary the written contract, but to put the Court in possession of all of the facts and circumstances surrounding the treaty and entering into the negotiation, to the end that it may ascertain whether there was any element of fraud, mistake or unfair advantage taken by the party seeking the equitable aid of the Court. In the leading case upon this subject, Sir William Grant, M. R., after laying down the general rule excluding parol evidence, to vary, alter or contradict the terms of a written contract, says: "But when equity is called upon to exercise its peculiar jurisdiction by decreeing a specific performance, the party to be charged is let in to show that, under the circumstances, the plaintiff is not entitled to have the agreement specifically performed." *Woolam v. Hearne,* 7 Ves., 211; L. C., Eq., Vol. II, part 1, 510. The evidence was competent for the purpose for which it was admitted. Defendant did not deny that he had signed the contract as it was written, nor did he allege that it had not been correctly read to him, but that he was induced to enter into it by the promise of the plaintiff to transfer to him the option on the Sigmon farm. His Honor's charge upon the first issue was correct. Without imputing any intentional wrong to any of the parties, equity will not give the plaintiffs an unfair advantage over the defendant by enforcing one part of the contract, and leaving the other unperformed. The judgment of his Honor was in accordance with the former decision of this Court. There is

No error.

C. E. MUSE v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 16 December, 1908).

1. **Railroads—Rights of Way—Permissive User—Trespasser—Permissive Licensee.**

   The fact that a railroad company has permitted the public to use a part of its right-of-way as a street does not affect its right to use such part in the conduct of its business, and place lumber or other merchandise thereon in so doing; a person entering thereon, not upon matters relating to the company's business, is a permissive licensee.

2. **Railroads — Permissive Licensee — Contributory Negligence — Proximate Cause.**

   The defendant railroad had piled scantling along its right-of-way, and plaintiff, a permissive licensee, was injured by the defendant's locomotive striking a scantling while backing, and throwing it upon him. *Held*, that the jury, by finding, under a proper instruction, that by the exercise of the care required of an ordinarily prudent man, under the circumstances, the plaintiff should have perceived the probability of the occurrence, necessarily found that plaintiff's negligence was the proximate cause of the injury.

3. **Same—Concurrent Negligence.**

   A railroad company does not owe the same degree of care in preventing an injury to a permissive licensee as it does to its passengers, or employees in the discharge of their duties; and if a railroad company and the permissive licensee on its right-of-way are both negligent, and the latter is injured, and his negligence is concurrent with that of the railroad and continues up to the moment of the impact, the law attributes the injury to his negligence and not to that of the defendant.

4. **Instructions Asked—Substantially Given.**

   When the charge by the Court presents every phase of the controversy, with correct instructions as to the law, a new trial will not be awarded for failure to give the instructions asked, although they may involve correct propositions of law.

ACTION tried before *Jones, J.*, and a jury, March Term, 1908, of SCOTLAND.

Plaintiff sues in two causes of action for recovery of damages sustained by personal injuries caused by the negligence of defendant. The undisputed facts are, that the defendant's track runs through the town of Laurinburg, east and west, crossing, at right angles, Gill street and McLaurin avenue. Between these two streets, two side-tracks run off from the south side of the main line near Gill street, running nearly parallel with the main line in a westerly direction to, and across, McLaurin avenue. The side-track next the main line is known as the "Warehouse track," and next thereto as the "Oil Mill siding." The depot is west of McLaurin avenue. Between the depot, on the west, and Gill street, on the east, south of the main line, beginning at the depot and going east, are located the cotton platform, the lumber skids, a drum and a derrick used for loading lumber. These are on a strip of land about fifty feet wide and extending from Gill street to McLaurin avenue along the south side of the track. This strip of land was also used by the railroad, and its patrons, for storing lumber, cross ties, telegraph poles and other freight or railroad material. It is called "Railroad street" and, for many years, had been used as such by the public who passed over it in vehicles and on foot, with the knowledge and acquiescence of defendants, Seaboard and Carolina Central Railway Companies. It is a part of the right of way and has never been condemned or dedicated, but had been worked by the town authorities. On Sunday morning, 4 March, 1906, plaintiff went to the depot and was, at the time of sustaining the injury, standing on Railroad street, six or eight feet south of the siding, waiting for an engine backing down the siding to reach that point, for the purpose of talking to the engineer. The engine was backing to a train of freight cars down the siding. While he was standing in this position, some part of the train caught the end of a plank lying on the east side of a skid, at an angle of about thirty degrees, violently throwing it against plaintiff, inflicting serious injury. Plaintiff did not notice any lumber lying at the place, liable to come in contact with the car. "Railroad street" was on defendant's right of way. The injury sustained, as described, constitutes plaintiff's first cause of action. After he was struck by the scantling, the train moved again, and while he was down he was again struck by a plank and injured, and this constitutes his second cause of action. The defendants denied that they were guilty of negligence, and pleaded contributory negligence on the part of plaintiff. The usual issues, raised by the pleadings, were submitted to the jury, who found, upon the first cause of action, that defendants were guilty of negligence and that plaintiff was guilty of contributory negligence. Upon the second cause of action, they found for the plaintiff, upon both issues, and assessed his damages at $3,800, for which judgment was signed. Plaintiff noted numerous exceptions to his Honor's rulings upon the issue of contributory negligence and, from a refusal to grant a new trial upon that issue, appealed.

J. G. McCormick, McLean & McLean and *Cox & Dunn* for plaintiff.

Burwell & Cansler, Jno. D. Shaw and *Gibson & Russell* for defendants.

CONNOR, J., after stating the case: Plaintiff concedes that "the only exceptions which require notice cluster around the question of contributory negligence." While it is conceded that the strip of land, upon which plaintiff was standing when he was injured, has been used by the public for many years, it is a part of defendants' right of way, and by permitting the use of it, as described, they lost none of their rights to use it for "railroad purposes." A railroad company owns its right of way as a necessary means of discharging its duty as a common carrier to the public, and cannot dispose of it, or, by permissive user, as a passway, confer any rights upon the public inconsistent with the purpose for which it has been acquired, by any of the methods known to the law or named in the charter. The right of way is dedicated to a public use.

It is for this reason protected against loss by adverse or permissive possession of its right of way. Revisal, sec. 388; *R. R. v. McCaskill,* 94 N. C., 746; *R. R. v. Olive,* 142 N. C., 257. The fact, therefore, that the defendants permitted the public to use a portion of the right of way, and that it was called "Railroad street," upon which plaintiff was standing when injured, does not affect the defendants' right to place the lumber on the right of way. The defendants had a right to place such structures, or obstructions, on it as were necessary, or convenient, for the conduct of their business as a common carrier. They also had a right to pile lumber, or other material, on it, either for their own use or the use of their patrons, and the officers and agents are the sole judges of such necessity or convenience, subject, of course, to the police power of the town, as any other property owner. *Olive v. R. R., supra,* When, therefore, the plaintiff went upon the right of way, as described by himself, he was at best but a permissive licensee, and the duty of the defendants to avoid injuring him, and his own duty to avoid being injured, is measured by the well settled rules of law in regard to persons occupying that relation. He was not on the right of way for the purpose of transacting any business with the defendants, or their employees, within the scope of their employment. We have uniformly applied the principle fixing the relative rights and duties of the company and persons going upon its right of way, to cases coming before us. The last case was *Bailey v. R. R.,* at this term. As illustrative of its application in this case, our attention is called, in defendants' brief, to a number of decisions of other Courts.

In *West Virginia R. R. Co. v. Fuller,* Md., 61 L. R. A., 574, the plaintiff's intestate, a boy who, it was alleged, was standing in a yard adjoining the right of way of the defendant railway company, was killed as a result of a box car being negligently thrown from the railway track by reason of a collision between two trains. The Court held, that if the boy was standing *off* the right of way he *might* be entitled to recover, but that if he was standing *on* the right of way, he was a *trespasser,* to whom the company owed no duty, except not to wilfully or wantonly injure him, and he would not be entitled to recover.

In *Manning v. R. R.* (W. Va.), 16 L. R. A., 271, the plaintiff's intestate, without express invitation, visited the telegraph office of the defendant, for the purpose of paying a friendly call to the operator; the office being located on the right of way. While in the office, one of the defendant's trains was derailed, on account of the negligence of its servant in leaving a switch open, and ran into the telegraph office and killed the plaintiff's intestate. The Court denied the right of the plaintiff to recover, on the ground that his intestate was a mere trespasser and the defendant owed him no duty other than not to wilfully injure him.

In *Poling v. R. R. Co.,* 24 L. R. A. (W. Va.), 215, plaintiff's intestate was standing on the defendant's right of way, within two steps of a public highway, and fifteen feet of a mail crane, for the purpose of watching the postal clerk catch the mail bag that had been suspended from the crane while the train was in motion. In some way, as the postal clerk undertook to make the catch, a sliver from the mail crane broke off and was hurled against the plaintiff's intestate, killing him.

In denying the right of the plaintiff to recover, the Court held that his intestate was a mere trespasser, or, at most, a permissive licensee, and the defendant therefore owed him no duty other than not to wilfully or wantonly injure him, and was consequently not legally responsible for his death; the Court saying: "He was there simply as a looker-on, to see the mail train go by and a mail agent make the flying catch of the mail pouch. Therefore, he was a mere trespasser or, at best, a voluntary licensee. The company made no change to endanger him after he came. It owed him no duty that was violated. It was a case in which the unexpected happened and its liability to happen could not be foreseen, and is only proved by the actual happening."

In *Holland v. Sparks* (Ga.), 18 S. E., 990, plaintiff's intestate was walking along near the defendant's track, upon its right of way, when a freight train was derailed as a result of being negligently run too rapidly, and one of the cars struck plaintiff's intestate and killed him. In holding the plaintiff was not entitled to recover, the Court said: "In the present case it was insisted that the servants in charge of the defendant's freight train were running it at a high and dangerous rate of speed and that this conduct on their part amounted to negligence. Most probably it was a violation of the duty which these servants owed to the company and to those whose property was being transported by the train, and in this respect their conduct may have been negligent. But we do not think their failure to observe due care and diligence in running the train was negligence, as against one in no way connected therewith, and whose injury, by its rapid running and derailment was a consequence so remote as to require almost the gift of prophecy to anticipate it."

So, in the leading case of *Sweeny v. R. R.*, 10 Allen, 368, cited with approval in *Quantz v. R. R.*, 137 N. C., 139, the Court said: "So a licensee who enters on premises by permission only, without any enticement, allurement or inducement being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or pitfalls. He goes there at his own risk and enjoys the license subject to its concomitant perils. No duty is imposed by law on the owner or occupant to keep his premises in a suitable condition for those who come there solely for their own convenience or pleasure."

In *Carr v. R. R. Co.* (Mo.), 92 S. W., 874, plaintiff, while walking along one of the defendant's railway tracks which was habitually used by pedestrians, was injured by being struck by a brake-shoe which was thrown from a train running in the opposite direction on a parallel track, on account of the alleged negligence of the defendant in permitting the defective shoe to be upon its train.

In holding that the plaintiff, in no view of the law, was entitled to recover, the Court said: "The plaintiff was on the defendant's right of way, enjoying the privilege merely of a license in walking thereon, and the company owed him no other or greater duty than not to negligently or wantonly injure him. The evidence in no way shows that the injury was the result of negligence on the part of the company. . . . . If there is no evidence of wilful, reckless or wanton disregard of human life, on the part of the operatives of the train, there is nothing for the jury to pass upon, and the Court should sustain a demurrer to the evidence. The courts make a distinction between a person who comes upon railroad premises at the invitation of the railroad company, or for some purpose connected with its business, and a person who goes upon such premises for his own convenience or pleasure. In the one case there is a duty to protect the person thus going upon the property of another from injury, while on his premises; while as to the other there is no such duty." *Peterson v. R. R.,* 143 N. C., 265. In *Ray v. R. R.,* 141 N. C., 84, the plaintiff was a passenger and was injured by a backing train.

The question of contributory negligence was submitted to the jury. Upon the second issue his Honor instructed the jury, that "If they found by the greater weight of the evidence that the plaintiff, by the exercise of that care which an ordinarily prudent man would have exercised under similar circumstances, could have discovered that the said piece of scantling was lying so dangerously near the defendant's side-track as to make it probable that it would be struck by the passing train and injure the plaintiff in the way he was injured, in time to have avoided being so injured, then the Court charges you that the plaintiff was guilty of contributory negligence of the defendant in bringing about his injury, and you will answer the second issue 'Yes.'" While it is by no means clear that, in the light of the plaintiff's evidence, he may not have told the jury to answer the first issue in the negative, that question is not presented, and we do not decide it. Certainly, however, when his Honor placed upon the plaintiff the same standard to avoid being injured as he imposed upon the defendants to avoid injuring him, the plaintiff cannot complain. The defendants were using, in a lawful way and for a lawful purpose, their right of way, while plaintiff, in the most favorable view for him, was a voluntary or permissive licensee. He had the same, if not better, opportunity of seeing the physical conditions, by which he was surrounded, as the defendants' employees. There was no concealed danger. The pile of lumber and the position of the plank or scantling was obvious. It is true that he did not see or observe tha tthe plank was in a position to be struck by the backing train, and it is also true that defendants' employees did not see or observe it. Conceding that it was the duty of one to do so, why was it not equally the duty of the other? Why, as contended by plaintiff, were defendants guilty of negligence in not seeing the position of the plank and he relieved of all obligation to see, standing within two or three feet of the pile, while defendants' employees were discharging their duty on the moving train? The jury found that both should have done so, and by the exercise of reasonable care could have prevented the accident. The negligence of both continued up to the last moment, leaving no element of the last clear chance in the case. In this condition of the record it is manifest that the plaintiff cannot recover. The jury having found, under his Honor's instructions, that the plaintiff in the exercise of the care of an ordinarily prudent man, under similar circumstances, could have discovered that the piece of scantling was lying so dangerously near the track as to make it probable that it would be struck by a passing train and injure him in the way he was injured, in time to have avoided being so injured, no other conclusion could be reached than that his failure to get out of the danger from the train, which he knew was backing and for which he was waiting, was the proximate cause of the injury. Both parties are held to corelative duties, not necessarily or always the same, but regulated by the relation which they occupy in respect to the transaction or occurrence, by reason of which the injury is caused.

The owner of premises in their lawful use owes to a trespasser or permissive licensee a duty, the standard of which is fixed by law. The trespasser or licensee owes to himself, while on the premises, a duty also fixed by law. If, by reason of the failure of both to act up to the standard, the trespasser or licensee is injured and such failure is concurrent with and continues up to the moment of the impact, the law attributes the injury to his failure and not to that of the defendant, and does not permit a recovery. This is the basis upon which the doctrine of contributory negligence, which bars a recovery, is founded. This was the sole question involved in this case upon the second issue. His Honor properly defined the plaintiff's duty, and the jury found that he failed to act up to the standard.

Many of the numerous requests for instructions were calculated to confuse the real question and mislead the jury. We do not mean that they were so intended. In every case involving liability for alleged negligent conduct, either of commission or omission of duty, the decision may be simplified, and much confusing language eliminated, by keeping in mind the elemental truth that the real inquiry is whether there has, in the concrete case, been a breach of duty by either or both parties. This being answered, the sole remaining inquiry is where the proximate cause of the conditions produced by such breach of duty is located. Usually the questions combine both law and fact, and the latter must be decided by the jury. In some exceptional cases, upon well settled principles, the question is one of law to be decided by the Court by instructions to the jury, or upon demurrer to the evidence. His Honor put the real question upon the second issue in its simplest form and, at the same time, comprehended every essential element involved.

Many of the exceptions have no relation to the question of contributory negligence and were properly refused. It is well settled, that when the charge given presents every phase of the controversy, with correct instructions as to the law, a new trial will not be awarded for failure to give instructions asked, although they may involve correct propositions of law. The instructions given bring the case within this rule.

We do not find any merit in the exceptions to the admission and rejection of testimony. His Honor properly exercised his discretion in denying the motion to set aside the verdict on account of the alleged misconduct of the jury. The wisdom of the well settled rule excluding evidence from the jurors tending to impeach their verdict, is illustrated in this case. Upon the whole evidence, the deplorable injury sustained by the plaintiff appears to have been one of those accidents which overtake men in life for which it is impossible to account, or to affix any moral or legal accountability. While the jury may well have found this to be so, they have reached the same result by fixing blame on both parties. This is one of the tendencies of the human mind, the other and more charitable being to attribute to unforeseen and uncontrollable causes many of the incidents of human life. The plaintiff recovered substantial damages on his second cause of action, and it would seem that the jury, within the latitude necessarily and perhaps wisely given them, have done substantial justice. At least there is no error entitling either party to further prolong the litigation. The judgment must be

Affirmed.

STATE v. TOBE WILKES.

(Filed 23 September, 1908).

Wilful Abandonment of Crops—Revisal, 3366—Jurisdiction—Judgment Arrested.

A Court of a Justice of the Peace has final jurisdiction of a wilful abandonment of crop in violation of Revisal, sec. 3366. A judgment of the Superior Court, to which the indictment was originally brought, will be arrested.

INDICTMENT heard before *W. R. Allen, J.*, Term Time, of GREENE.

Assistant Attorney-General Clement for the State.
W. S. O'B. Robinson and *J. P. Frizzelle* for defendant.

PER CURIAM. Indictment originating in the Superior Court of Greene County for wilfully abandoning a crop without cause before paying advances, in violation of sec. 3366 of the Revisal.

In this Court defendant moved to quash the proceedings and arrest the judgment upon the ground that, under said statute, the Superior Court had no original jurisdiction, in that the punishment is a fine not exceeding fifty dollars or imprisonment not exceeding thirty days. The Court is of opinion, upon examination of the statute, that the offence is within the final jurisdiction of a justice of the peace and that the Superior Court did not have original jurisdiction. The case cited, *State v. Robertson*, 143 N. C., 620, has no application, as the original record shows it originated in the Justice's Court.

Judgment arrested.

STATE v. SOLOMON K. KHOURY.

(Filed 28 October, 1908).

1. **Defenses—Pleas Withdrawn—Discretion—Appeal and Error.**

   When the defendant in a criminal action has entered the plea of "not guilty," and subsequently desires to withdraw it and enter the plea of "insanity," and no ground was laid by affidavit or otherwise to show that defendant was insane at the time the plea was entered or at the time of trial, it is within the sound discretion of the trial Judge to refuse the withdrawal of the plea, and his action is not reviewable on appeal.

2. **Same—Witnesses.**

   It is competent for the trial Judge, in determining whether he will allow a plea of "not guilty," formerly entered, to be withdrawn and the plea of "insanity" entered in its stead, to permit witnesses, who had seen defendant and had an opportunity to form an opinion as to his mental condition, to express their opinion thereon.

3. **Instructions—Charge in Writing—Supplementing, etc.—Charge Orally.**

   While the trial Judge, when duly requested, must put his entire charge in writing, he may orally state the contentions of the parties or supplement slight omissions, and his doing so is not reversible error.

ACTION heard before *Peebles, J.*, and a jury, August Special Term, 1908, of CUMBERLAND.

At the March Term, 1908, of the Superior Court of Cumberland County, a Bill of Indictment, charging defendant with burglary in the second degree, was found by the grand jury. At said term, defendant, through his counsel, came into Court and entered his plea of "not guilty." At the same term, the brother of defendant filed an affidavit upon which he based a motion for a continuance of the case on account of the absence of certain witnesses named, by whom he expected to show that defendant is of unsound mind, and has been so for one or two years. The motion was continued.

At May Term, 1908, Judge Long presiding, defendant, through his counsel, tendered a plea of insanity at that time, and at the time of the alleged commission of the offence. He also moved to strike out the plea of not guilty entered at the last term, stating that he did not intend to enter such plea, and did not recollect having done so. The motion was continued. At the August Special Term, 1908, the motions were renewed, and counsel also moved to amend the record by striking out the plea of "not guilty." Motion refused. The defendant excepted. Defendant was put upon his trial upon his plea of not guilty. Verdict of guilty. Defendant moved in arrest of judgment upon the ground that he was then insane. Motion overruled. Defendant excepts. Judgment and appeal.

Assistant Attorney-General Hayden Clement for the State.
V. C. Bullard and *Q. K. Nimocks* for defendant.

CONNOR, J., After stating the case: The first assignment of error is directed to his Honor's refusal to permit defendant to withdraw his plea of "not guilty," or to amend the record by striking out said plea and submitting an issue directed to the question of his insanity at the time of the trial. His Honor refused this motion and, upon the trial, heard evidence in regard to defendant's insanity, both at the time of the trial and the time the alleged crime was committed. No ground was laid by way of affidavit or otherwise at the time the case was heard by Judge Peebles, to show that defendant was insane at the time the plea was entered, March Term, 1908, or at the time of the trial. It was in the sound discretion of the Judge to refuse to strike out the plea of "not guilty," entered at March Term. We see no ground upon which his Honor's action, in that respect, can be disturbed. Whether, at the time defendant was put upon his trial, the Court should have suspended proceedings and empaneled a jury to ascertain whether he was then insane, is a matter resting in the sound discretion of the Court. In *Haywood's* *case,* 94 N. C. 847, the Court, upon suggestion of counsel, submitted an issue directed to the defendant's present insanity. This Court ordered a new trial upon entirely different grounds. While, as suggested by *Smith, C. J.,* it would have been more fitting that the suggestion of present insanity be first tried, he said that to try the question together with the issue of traverse was not error in law which would vitiate the verdict. In *Vann's case,* 84 N. C., 722, the question of insanity, supported by affidavits, was made after conviction and upon motion for judgment. The Court directed a jury to be empaneled to try the question. This course was approved by the Court. "Although, if there be a doubt as to the prisoner's insanity at the time of his arraignment, he is not to be put upon trial until the preliminary question is tried by a jury, the question of the existence of such a doubt seems to be exclusively for the determination of the Court; and counsel for the defendant can neither waive an inquiry as to the question of defendant's sanity, nor compel the Court to enter upon such an inquiry when no ground for doubting it appears. . . . And the question whether an inquiry is called for by the circumstances of the case, is for the determination of the Court, who may also direct the manner in which such inquiry shall be conducted. Error will not lie to review the proceedings upon such an inquiry, whether the allegation of insanity be made before or after the conviction of the prisoner." Buswell on Insanity, sec. 461. In many States statutes have been enacted providing procedure in such cases. In this case his Honor stated, that if an affidavit was filed that defendant had become insane since the time the crime was alleged to have been committed, he would not allow the plea to be put in. Counsel said they could not file such affidavit. The Court thereupon proceeded with the trial, stating that evidence on the question of insanity, either at the time of the alleged commission of the crime or at the time of the trial, could be introduced. We can see no error in this course. It cannot be permitted that, with a defendant at the bar of the Court when his manner, appearance, etc., may be seen by the Judge, the trial may, upon the mere suggestion of counsel, unsupported by affidavit or otherwise, be stopped until a jury be empannelled to try the "suggestions."

The Court permitted witnesses, who had seen defendant and had more or less opportunity to form an opinion as to his mental condition, to express such opinion. This is in accordance with repeated rulings of this Court and may now be regarded as settled law. The value of the opinion is dependent upon the opportunity of the witness to form it. *Clary v. Clary,* 24 N. C. 78; *State v. Bowman,* 78 N. C. 509.

Defendant made a number of requests for special instructions upon the question of insanity, burden of proof, etc. We have examined his Honor's charge and find that, so far as defendant was entitled, they were given. We do not find any error in the instructions given. His Honor was requested to put his charge in writing, which he did. The case on appeal states: "Aside from the written charge, he paused several times and commented on or explained certain features of the written charge, to which defendant excepts. After he had read his charge he stated, orally, the contention of the parties, and gave oral instructions as to the law bearing on certain features of the contentions of the parties, to which defendant excepts." It is not suggested that any instructions given orally were erroneous or prejudicial to defendant. We do not think defendant entitled to a new trial because of the action of the Judge in this respect. While it is true, as held in *Jenkins v. R. R.,* 110 N. C., 438, the Judge must put his entire charge in writing, when so requested, it is not reversible error to state the contentions of the parties orally or to supplement, as did his Honor in this case, slight omissions. At least in the absence of any suggestion of error or prejudice, a new trial will not be ordered. We have examined the entire record and find no error. For the reasons given in regard to the suggestion of insanity before the trial, his Honor could not arrest the judgment upon a mere suggestion of insanity after trial. There is

No error.

STATE v. ED. ALLEN.

(Filed 28 October, 1908).

Indictment—Burning Barn—Evidence, Sufficient.

Upon trial under an indictment for burning a barn in violation of Revisal, sec. 3338, there was evidence for the State tending to prove bad blood between the owner and defendant growing out of a previous difficulty, with threats of defendant against the owner and another on that account, and that the barn of the other person was burned previously to the burning of the barn in question; that the barn in question was burned about four o'clock A. M., within 375 yards of defendant's house, in plain sight, and the fire attracted the whole neighborhood except defendant, who said he did not know of it until between nine and ten o'clock, though there was evidence that defendant arose that morning between four and five o'clock; that there were well-defined running tracks from the burnt barn to defendant's house, larger than defendant's shoes, which were followed and he was found on the other side of his house, leaving it with a gun; that defendant was asked to go to the burnt barn, hesitated, refused and then complied and refused to have his shoe measured, but walked off sixty or seventy-five yards and told witness to come and measure the tracks, which was not done. *Held*, sufficient to sustain a verdict of guilty.

INDICTMENT for burning a barn in violation of sec. 3338, Revisal, tried before *Jones, J.*, and a jury, March Term, 1908, of UNION. The defendant was convicted and appealed.

Assistant Attorney-General Clement for the State.
Adams, Jerome & Armfield for defendant.

BROWN, J. The record presents two exceptions to the rulings of the trial court, one of which has been abandoned here.

The remaining exception is to the refusal of the judge to charge the jury that the evidence is insufficient to convict.

The evidence is circumstantial in its nature, but amply sufficient in its probative force to justify the court in submitting the guilt of the accused to the determination of the jury.

The evidence tends to prove that the defendant had "bad blood" for the prosecutor, Jim Bivins, whose barn was burned at night on 6 November, 1907, as well as against one Crowder, growing out of the destruction of defendant's crop of corn in July or August of that year; that defendant made threats against both Crowder and Bivins. It appeared, upon cross examination of defendant, that Crowder's barn was burned two weeks before the burning of Bivin's barn. The latter's barn was burned about 4 o'clock in the morning, destroying two mules and other valuable property within 375 yards of defendant's house and in plain sight. The fire attracted to it the entire neighborhood except defendant, who was in his house at the time. In the morning well defined tracks were followed direct from the burned barn to defendant's house. The tracks as they left the barn appeared to be "running tracks." The witnesses examined other side of defendant's house and could find no tracks. Witness testified that tracks were made by a party wearing a brogan shoe of rather large size—larger than Mr. Austin, who wore a No. 8. Defendant testified that he wore a No. 9; also wore brogan shoes. That when witnesses followed these tracks to defendant's house they saw defendant on the other side of the house, leaving, with a gun on his shoulder; that they called him and told him they had followed the tracks there, and that the tracks went no farther, and asked defendant to go with them over to the burning barn; that the defendant at first declined to go, but later followed them over there.

The evidence further showed, that, when defendant arrived, Mack Bivins asked him to let him measure his shoe, in order to see if it corresponded with the foot prints. Defendant refused to do so, and walked off some sixty or seventy-five yards, then called witness and told him to come and measure the track, but witness did not go to defendant. Defendant stated to these witnesses that he did not know the barn was burning until they came over there, between 9 and 10 o'clock, and told him of it. This statement is highly suspicious because defendant's house was in plain sight of the barn, and prosecutor saw the fire three miles off. Defendant's wife testified that defendant arose that morning between 4 and 5 o'clock, built a fire and sat by the fire until it was light enough to feed. All these facts and circumstances are not only some evidence, but amply warrant the finding of the jury that the defendant is guilty as charged.

No error.

STATE v. JAMES DIXON.

(Filed 28 October, 1908).

1. **Larceny—Evidence, Sufficient.**

   Meat found in defendant's smokehouse and identified by private marks by the owner as that taken from his smokehouse, which had been broken into and meat stolen therefrom, is sufficient evidence to sustain an indictment for larceny.

2. **Instructions—Charge in Writing—Sufficient Compliance.**

   When, upon request of counsel, the trial Judge puts his charge in writing, and it is a full instruction generally as to the law applicable thereto, it is permissible for him to read his notes of evidence to the jury, and there is no error therein when it does not appear that the interest of the party has been prejudiced.

3. **Instructions—Reasonable Doubt—Sufficient Charge.**

   In a criminal case it is not to defendant's prejudice for the trial Judge to charge the jury, in substance, upon supporting evidence, that a reasonable doubt implied that the jury must be satisfied to a moral certainty, and, if the State has so satisfied the jury, they should return a verdict of guilty, when other parts of the charge relating to the same subject matter correctly state the law.

4. **Larceny—Witness in Own Behalf—Evidence, Weight of—Instructions.**

The material question as to the correctness of the charge of the trial Judge, bearing upon the credibility of the evidence of defendant, a witness in his own behalf on a trial under indictment, is whether the jury was misled to defendant's prejudice, and it is not error for the lower Court to charge the jury that they should consider the interest he had, scrutinize his evidence closely, but they would not be warranted in refusing to believe his evidence because of the fact he was under indictment.

5. **Appeal and Error—Larceny—Value of Goods—Burden of Proof—Term of Sentence.**

When there is no evidence appearing in the record of the value of goods stolen by defendant, but it appears that they consisted of eighteen hams, eleven shoulders and eight sides of meat, he cannot successfully contend that a maximum sentence of twelve months' imprisonment could not be imposed, for it is incumbent on him to prove the value in diminution of the sentence.

INDICTMENT for larceny tried before *Neal, J.*, and a jury, April Term, 1908, of SAMPSON.

The defendant, James Dixon, was convicted under the second count in the bill for receiving, and sentenced to two years on the roads. From the judgment pronounced he appealed to the Supreme Court.

Assistant Attorney-General Clement, and *Faison & Wright* for State.

John D. Kerr, F. R. Cooper, and *Stevens, Beasley & Weeks* for defendant.

BROWN, J. The evidence sent up with the record tends strongly to prove that on Friday night, 6 March, 1908, the smoke house of one Bruner, in the county of Sampson, was broken into and a large number of hams, shoulders and sides of meat were stolen therefrom, and that on the next night this meat was found in the smoke house of defendant. The meat was identified by the owner by private marks or holes he had made at the bone. The evidence of guilt not only justified his Honor in submitting the matter to the jury, but it is plenary and convincing.

There are a number of exceptions to the testimony, all of them without merit, and we find nothing in them which requires discussion.

In respect to the charge of the Court, there are several assignments of error, some of which we will notice. There is nothing appearing in the record to sustain the exception "that his Honor, after having been requested to put the charge in writing, stated orally at great length, and with vigor, the contentions of the State, after having read the written charge, and the oral statement of the contentions of the State was error."

The written charge is a full instruction generally as to the law bearing on the charge, and although required upon request to be in writing as to the law of the case, it was entirely permissible for his Honor to read his notes of evidence to the jury. There is nothing in the record indicating that the Judge stated verbally "at great length and with vigor" the contentions of the State to the prejudice of the defendant.

The defendant excepts to that part of the charge relating to the oft discussed subject of the reasonable doubt. Judge Pearson doubted if this common formula had ever been of any practical benefit in the administration of the criminal law. But we think whatever benefit a person charged with crime may get from it was more than given this defendant, when his Honor stated substantially that a reasonable doubt implied that the jury must be satisfied to a moral certainty.

His Honor further told the jury in that connection, "If the State so satisfies you, you should return a verdict of guilty."

It is earnestly contended that this last expression is prejudicial error in that it withdraws from the jury any consideration of the evidence offered by the defendant. We think, with all respect to learned counsel, this exception has nothing to support it.

The burden was upon the State, after all the evidence was heard, to satisfy the jury beyond a reasonable doubt of defendant's guilt. Nothing in the language complained of took from the jury the right to weigh and consider the evidence offered in behalf of the defendant.

This is manifest from the language of the Court immediately following the phrase excepted to, viz: "If the jury after having heard all the evidence, and having given to it all a fair and deliberate consideration in an effort to reach the truth, and having then gathered all the light they can from the argument of counsel, and further having applied the charge of the Court, if the minds of the jury then reach the conclusion that the guilt of the defendant is established, then the jury would not in contemplation of law entertain a reasonable doubt." How could the jury entertain a reasonable doubt if after considering all the evidence they declared the guilt of the defendant to be established? When a fact is established it is completely and fully proven. We think the precedents fully sustain this charge of his Honor. *State v. Whitson,* 111 N. C., 695; *State v. Gould,* 90 N. C., 662.

The defendant excepts to that portion of the charge bearing on defendant's credibility, viz: "In passing upon the evidence of the defendant you should take into consideration the interest they have in the indictment. You should scrutinize their evidence closely; you would not be warranted in refusing to believe what they say because of the fact that they are under indictment, but you should consider their interest in the contest and give to what they say such weight as you think under all the circumstances it is entitled to."

We think this exception is without merit, as the charge distinctly instructs the jury that they would not be warranted in disbelieving what defendant testifies to, because he is under indictment. The instruction is in line with *State v.*

Byers, 100 N. C., 517, citing *Flint v. Bodenhamer,* 80 N. C., 205; *State v. Hardee,* 83 N. C., 619.

The essential question, in every case where error is based upon such instruction, must be, was the jury thereby misled to the prejudice of the defendant?

There is nothing whatever in the language of his Honor which can be said to express any opinion that he entertained; or that was calculated to cast any suspicion upon the defendant's testimony.

As long as the trial Judge did not cast suspicion upon his evidence, we fail to see how the defendant was prejudiced by the instruction.

We think the charge also sustained by the Courts of other States, *Palmer v. State,* 97 N. W. Rep. 235, a Nebraska case, *McIntosh v. State,* 151 Ind., 251.

The only other exception we deem it necessary to notice relates to the punishment. It is contended that the Court could sentence to no longer term than twelve months, as the value of the property was under $20.00. We fail to discover any such finding in the record or any evidence to sustain such contention. The property stolen consisted of eighteen hams, eleven shoulders and eight sides of meat, and doubtless the quantity of it deterred the defendant from attempting to prove that the meat was worth no more than $20.00. However that may be, it was matter of defense, and it was incumbent on defendant to prove its value in diminution of sentence. *State v. Harris,* 119 N. C., 812.

Upon an examination of the record we find no error that we think would require us to order another trial.

No error.

STATE v. C. D. DOBBINS.

(Filed 28 October, 1908).

1. Intoxicating Liquors, Sale of—Evidence Sufficient.

Evidence is sufficient to sustain a verdict of guilty of keeping for sale liquor, contrary to chap. 21 of the Laws of 1908, which tends to show, that the accused borrowed the keys of a shop from the owner between 7 and 7:30 A. M., no liquor then being in the shop; that the owner went to his shop about 10 A. M., and found the accused there alone; that a search was made shortly thereafter, and a barrel of pint and half-pint bottles of whiskey was found; that, before then, and at the time in question, accused had been twice seen visiting a negro pool-room, and there was indication of some of the whiskey having been taken from the barrel.

2. Same—Instructions.

Under an indictment for keeping liquor for sale, contrary to chap. 21, Laws of 1908, it is correct to charge the jury, when there is evidence to support the charge, that, in order to convict, they must find from the evidence, beyond a reasonable doubt, that the whiskey was in defendant's possession; that he was keeping it for sale, and there was more than one quart; and that if they were not so satisfied, the defendant should be acquitted.

3. Instructions—Language of Charge.

The language of a proper prayer for instruction need not be used if the charge by the Court is itself proper.

INDICTMENT for keeping for sale intoxicating liquor contrary to a special act, heard before *Jones, J.*, and a jury, May Term, 1908, of RICHMOND.

The defendant was indicted for keeping liquor for sale in the county of Richmond, contrary to chap. 21 of the Laws of 1908. One of the questions in the case is whether there was any evidence against the defendant of a violation of the statute.

George Smith, a witness for the State, testified: I am a tinner by trade and have a shop in the town of Hamlet, Richmond County. On 17 February, 1908, I let C. D. Dobbins have the key to my tin shop, between 7.00 and 7.30 A. M.

I returned to my shop about 10.00 A. M., on the same day, in company with one Charles Niven, and found C. D. Dobbins in my shop when we got there. There was no one else in the shop at that time. In a few minutes Dobbins went out, and a very short time thereafter, Mr. Hubbard, the policeman, came into my shop with papers to search it, and found a barrel full of pint and half-pint bottles filled with corn whiskey. There was no whiskey in my shop when I let C. D. Dobbins have the key at 7:30 that morning. The barrel of whiskey was put in my shop between the hour that I let Dobbins have the key and 10.00 A. M., when I returned. The officer took possession of the whiskey and arrested Dobbins. I never put the whiskey in there, and don't know who did.

I don't recall by whom I sent the key of my shop to Dobbins. He came to me and said that Dobbins wanted my shop key, and I handed it to him. I don't know whether he gave the key to Dobbins or not, but do know that I found Dobbins in possession of my shop when I reached there at 10:00 o'clock, about three hours later. There was no one in the shop except Dobbins.

J. A. Spencer, a witness for the State, testified: At the request of Chief of Police R. L. Hubbard, I watched the shop of George W. Smith and saw the defendant Dobbins in the shop; no one else was in there except him; soon after I was stationed to watch the shop, I saw Dobbins come out of the shop, lock the door, and go over to a negro pool room. In five or ten minutes I saw the defendant come back to the shop, unlock the door and go in. The defendant had been in the shop a very short time when I saw G. W. Smith, the owner of the shop, and one Charles Niven go in the shop. A few minutes after Smith and Niven went into the shop, I saw the defendant, Dobbins, leave the shop a second time and go to the negro pool room. At this time, Chief of Police Hubbard came to me with papers to search the shop for liquor. We proceeded to the shop, and in the back end of the shop found a barrel full of pint and half pint bottles of corn liquor. It had been opened, and appeared as if some of its contents had been taken out. Smith, the owner of the shop, told me that he had sent his key to C. D. Dobbins early that morning, and he had not returned to the shop, after sending his key to Dobbins, until a few minutes before I came in; that when he returned to the shop he found Dobbins in the shop, but knew nothing of the liquor being in the shop until we found it. The general character of G. W. Smith is good.

R. L. Hubbard, a witness for the State, testified: I was chief of police in the town of Hamlet on 17 February, 1908, and in consequence of information received by me, I got J. A. Spencer to watch the movements of the defendant, also the tin shop of G. W. Smith. I saw the defendant open the door and go into the shop and later come out, lock the door, and go over towards a negro pool room; and saw him return, open the shop, go in and come out the second time, and go towards the pool room; at which time, in consequence of these movements and the further information I had received, I had a warrant issued, under the statute, to search the shop for liquor kept for sale contrary to law; I left Spencer to watch the shop while I went before the mayor and got the warrant to search the premises; when I returned I saw the defendant in the shop. No one else was in the shop except the defendant. I saw him go to the window and look out apparently for the purpose of seeing whether any one was watching his movements; then he came out and went towards the pool room; G. W. Smith, the owner of the shop, and Charles Niven came to the shop a few minutes before the defendant left the last time, and a few minutes after he had left, I and Spencer, under the warrant I had received for searching the shop, went to the shop, searched the same, and found a barrel of whiskey containing pint and half pint bottles. The defendant had only been gone a few minutes when this search was made and the liquor was found. G. W. Smith told me that he knew nothing about the whiskey being in the shop, and that he sent his key to the defendant that morning about 7:00 o'clock, and found the defendant in his shop when he got there; that the liquor did not belong to him, and that he knew nothing at all about it. The general character of the witness G. W. Smith is good.

The defendant offered no testimony, but requested the Court to instruct the jury:

1. That there is not sufficient evidence to warrant the jury in convicting the defendant, and the jury will return a verdict of not guilty.

2. If the evidence does not remove every reasonable view of the case except the guilt of the defendant, the jury will return a verdict of not guilty.

The Court refused to give the instructions, and the defendant duly excepted. Judgment was entered upon the verdict of guilty, and the defendant appealed.

Assistant Attorney-General Hayden Clement for State.
Morrison & Whitlock for defendant.

WALKER, J., after stating the case: If we treat the first prayer for instructions as a request to charge the jury that there was no evidence of the defendant's guilt, we think it was properly refused. The evidence was circumstantial, it is true, but it strongly pointed to the guilt of the defendant. If the jury found the facts to be in accordance with the testimony, they could hardly escape the conclusion that the defendant had placed the liquor in the shop of the witness, George Smith. But whether the testimony against the defendant was strong or weak, it should have been submitted to the jury, if it was not merely conjectural, but reasonably tended to establish his guilt. *Byrd v. Express Co.,* 139 N. C., 273. Why it did not have this tendency, we are unable to see. The liquor was not in the shop when the key was given to the defendant, and shortly thereafter Smith returned to the shop and found the defendant there, and immediately afterwards the policeman came and found a barrel of pint and half pint bottles filled with corn whiskey. There were other circumstances which tended to show the defendant's guilt, as will appear from a perusal of the evidence.

It was not necessary that the Court should have given the second prayer for instructions in the very words in which it is expressed. The law does not require that any particular formula shall be used in charging upon the doctrine of reasonable doubt. *State v. Adams,* 138 N. C., 688. The Court charged the jury that, in order to convict the defendant, they must find from the evidence beyond a reasonable doubt, that the barrel filled with bottles of whiskey was in the defendant's possession, that he was keeping it for sale and that there was more than one quart, and that, if they were not so satisfied, the defendant should be acquitted. There was no error in this instruction, and it was sufficiently responsive to the defendant's second prayer.

No error.

STATE v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 5 November, 1908).

1. **Penalty Statutes—Railroads—Sunday, Running of Freight Trains—Permission—Evidence.**

   Upon a trial under an indictment against a railroad company for loading, running, etc., a freight on Sunday, in violation of the provisions of Revisal, 3844, the State must show, beyond a reasonable doubt, that the defendant had permitted the offense to be done; but when the State has shown the wrongful act, it is sufficient for the jury to find that it was done with defendant's permission.

2. **Same—Reasonable Doubt—Burden of Proof.**

   Upon trial for violating the provisions of Revisal, sec. 3844, it is error for the lower Court to charge the jury that the burden was upon defendant to show that a certain freight train was run without its permission, when there is conflicting evidence upon that question; for, in order to convict, they should find as a fact, beyond a reasonable doubt, that the defendant had permitted the running of the train in violation of the statute.

3. **Penalty Statutes—Railroads—Evidence—Questions for Jury.**

   When a *prima facie* case is made out by the State against a railroad company for running its certain freight train on Sunday, in violation of Revisal, sec. 3844, and the company has introduced evidence tending to prove that it was done without its permission, it is error in the lower Court to charge the jury, if they should find from the evidence that the train in question belonged to the defendant, they should find the defendant guilty, unless its evidence satisfies them that the train was being run without its permission, as the question is exclusively one for the jury.

INDICTMENT tried before *Neal, J.*, and a jury, August Term, 1908, of WILSON.

This is an indictment for permitting a train of cars to be run on Sunday, between sunrise and sunset, contrary to sec. 3844 of the Revisal, which is as follows: "If any railroad company shall permit the loading or unloading of any freight car on Sunday, or shall permit any car, train of cars, or locomotive to be run on Sunday on any railroad (except the trains specified in the section) such railroad company shall be guilty of a misdemeanor in each county where such car, train of cars or locomotive shall run, or in which any such freight car shall be loaded or unloaded, and upon conviction shall be fined not less than five hundred dollars for each offence." The evidence introduced by the State tended to show that on Sunday, 19 May, 1907, a freight train passed through Wilson, it being a "solid coal train," with an engine and tender on which were the letters A. C. L., they being the initial letters of the defendant's corporate name. The train was going south between five and six o'clock P. M. The defendant objected to this evidence in apt time, because it was alleged in the indictment that the train was "run" on 1 May, 1908, whereas the proof is that it was "run" on 19 May, 1907. The objection was overruled and the defendant excepted. The evidence of the defendant tended to show that those having the authority to supervise and control the movement of trains, on the defendant's road, had positively forbidden the operation or running of any train on Sunday, contrary to the provisions of the statute. This evidence was in the form of special instructions to subordinates in the service, who had the immediate charge of the operation of trains, whose duty it was to obey all orders received from their superiors. It was also in evidence that the train mentioned in the indictment was run without the knowledge or consent of the defendant, and in violation of previous orders issued by it.

The Court charged the jury as follows: "If you find that the freight train loaded entirely with coal passed through Wilson on 19 May, 1907, before sunset, pulled by an engine belonging to the defendant, then you should find the defendant guilty, unless the evidence offered on the part of the defendant satisfies you that said train was running without the permission of the defendant. The burden of proof on the question whether the train was run by the permission of the defendant is on the defendant." To this instruction the defendant excepted.

The Court further instructed the jury that the ownership of the coal and the purpose for which it was transported was immaterial. Defendant excepted.

The defendant was convicted. A motion for a new trial having been overruled and judgment pronounced upon the verdict, the defendant appealed.

Assistant Attorney-General Hayden Clement for the State.

F. A. & S. A. Woodard and *Aycock & Daniels* for defendant.

WALKER, J., after stating the case: The offence created by the statute in question consists in the running of trains on Sunday by permission of the railway company. The statute is not so worded as to withdraw from its operation, by exception or proviso, trains which are run without the consent of the railway company, but the permission of the company is made an essential ingredient of the offence, and under well-settled rules of criminal pleading the State is called upon to show the permission in order to convict the defendant. This is not imposing upon the State a burden of proof which it is impossible to carry or requiring it to prove a fact, the existence of which can be more easily established by the defendant, for the plain reason that when the State has shown that the train was actually run on a Sunday, it has adduced evidence sufficient to warrant the jury to infer that it was done with the defendant's permission. It is a circumstance sufficient, at least, to support a conviction. It cannot be said, though, that the defendant is guilty simply because the train was drawn by one of the defendant's locomotives, for this would be taking evidence of the fact that it was run with the permission of the defendant for the fact itself. Instead of charging the jury as he did, the Judge should have instructed them, not that the burden was on the defendant to show that the train was run without its permission, which was telling them practically that the burden was on the defendant to acquit itself of the charge, but he should have charged that they should consider all of the testimony and find as a fact beyond a reasonable doubt that the defendant had permitted the train to be run on Sunday, before they could convict. The permission of the defendant is as necessary to the completeness of the offence, as the running of the train itself. It is of the very substance of the crime. Instead of thus charging the jury, the Court excluded the doctrine of reasonable doubt from their consideration, by making the verdict of guilty depend upon the finding of a single evidentiary fact, and placing the burden of disproving the leading constituent element of the crime upon the defendant. The Court, under this statute, misplaced the burden of proof. It was upon the State and did not shift during the trial. The distinction is between a fact which is made an essential element of the crime by the statute, and one which, by virtue of a proviso or otherwise, merely withdraws the particular case from its operation, or excludes it from the prohibited class. Many illustrations of it are to be found in our decisions.

The first instruction in this case is not substantially different from the one given in *State v. R. R.*, 145 N. C., 570. If the Judge had submitted the case to the jury upon the entire evidence, giving the defendant the benefit of the doctrine of reasonable doubt, and then told them that if they found the two essential facts, that the train was run on Sunday and with the permission of the defendant, the charge would have been in accordance with our ruling in that case. That was not done, but the defendant was erroneously placed at a disadvantage by being required virtually to disprove the fact of permission. The jury must find the fact of guilt, the Judge only declares the law.

In *State v. Simmons*, 143 N. C., 618, 619, we said: "The jury are the constitutional judges, not only of the truth of testimony, but of the conclusions of *fact* resulting therefrom. The evidence may, in the opinion of the Court, have been ever so strong against the defendant, yet it was for the jury to find the ultimate fact of guilt, without any suggestion from the Court, direct or indirect, as to what that finding should be. (*State v. Lilly,* 116 N. C., 1049). The presumption of innocence and the doctrine of reasonable doubt (alike) require that method to be pursued, and it is clearly enjoined by the statute we have cited (Revisal, sec. 535), the restraining words of which define clearly the respective functions of Court and jury in the trial of causes."

Upon the other question, as to the burden of proof, we need only refer to a few recent cases decided by this Court. "The general rule most undoubtedly is that the truth of every averment, whether it be affirmative or negative, which is necessary to constitute the offence charged must be established by the prosecutor. The rule itself is but another form of stating the proposition that every man charged with a criminal violation of the law is presumed to be innocent until shown to be guilty, and it is founded, it is said, upon principles of natural justice, and so forcibly has it commended itself by its wisdom and humanity to the consideration of this Court, that it has never felt willing, whatever circumstances of difficulty might attend any given case, to disregard it." *State v. Wilbourne,* 87 N. C., 532. That case was approved in *State v. Connor,* 142 N. C., 700. Even if the burden of proving that there was no permission to run the train was upon the defendant, the charge is still erroneous, because the ultimate fact of guilt was for the jury to find from all the evidence, and not for the court to declare. *State v. Woodly,* 47 N. C., 276; *State v. Evans,* 50 N. C., 250; *State v. McDaniel,* 84 N. C., 803. The last three cases are cited with approval in *State v. Wilbourne, supra.*

It is suggested that the Court should have charged the jury that, if they believed the evidence, they should convict the defendant. The Court could not well have instructed the jury to this effect, without disregarding material evidence in the case which tended to show the defendant's innocence. It is quite true that there was evidence of the defendant's guilt, but it was for the jury to say, at last, whether they were convinced of the defendant's guilt by that evidence, when weighed with the other evidence in the case. We are not permitted to refer to matters not stated in the record, nor could the Court below or the jury consider them.

The statute under which the indictment was found is a very wise and wholesome one, and should be obeyed by the railway companies and enforced by the Courts, but a defendant is entitled to have the question of its violation determined by the well-settled rules of law and, in any view we can take of the proceedings in the Court below, we think this was not done, and hence there was error.

New trial.

CLARK, C. J., dissenting: The conduct denounced by the statute, Revisal 3844, is "permitting any car, train of cars, or locomotive to be run on Sunday" between certain hours (with certain exceptions which are matters of defence and which, besides, clearly do not arise on the evidence in this case).

The evidence is uncontradicted that on 19 May, 1907, which was Sunday, before sunset, between 5 and 6 P. M., a solid coal train passed through Wilson on defendant's road, the engine and tender marked with defendant's name. It was in evidence by defendant's witness, W. H. Newell, its Superintendent of Transportation, that at the term of the Court ending Saturday, 18 May, 1907, the defendant had pleaded guilty to two indictments under this statute and a *nol pros* was entered in another case upon the "agreement" of defendant not to "run its trains on Sunday in violation of law." The same witness testified that the coal in the above train was the property of the defendant, and was being transported to Florence, S. C., for its use. Another witness for defendant, G. B. McClellan, its District Superintendent, testified that this train was made up and sent out of Rocky Mount by E. D. Gordon, local agent, H. E. Bruffery, train master, E. S. Dodge, chief train dispatcher and A. E. McKeathan, yard master, who "had charge of the Rocky Mount depot and yard, and the trains sent out from Rocky Mount were made up by these parties."

Thus there is proof from the defendant that this train running on Sunday, in violation of law, was made up and sent out by the *officials charged with that duty.*

Upon this evidence, the Court should have charged the jury, "if you believe the evidence, you will find the defendant guilty." How else could the defendant send out its trains, except by its officials charged with that duty? If the defendant is not responsible for their acts, acting within the scope of their duties, what would make a corporation liable? If they did it, the question of "permitting" it to be done does not arise.

In *State v. R. R.*, 119 N. C., 819, an indictment upon this very statute, where there was no evidence whatever except the fact that the defendant's freight train was running on Sunday after 9 A. M., the judge charged the jury, "If you believe the testimony the defendant is guilty," and on appeal *Avery, J.,* speaking for a unanimous Court, found no error.

There has been no change in the statute and no reason is given why a charge which was correct then has become erroneous now. Upon the above evidence, by the higher officials of the defendant, that the train was sent out from Rocky Mount by the four officials "having charge of the Rocky Mount depot and yard, and the trains sent out from Rocky Mount were made up by these parties," the jury could draw no other inference, "if they believed the evidence," than that the defendant was guilty. *State v. Riley,* 113 N. C., 651.

It is true Mr. McClellan adds, "it was the duty of these parties to have obeyed the order sent them," which he says was sent by himself, not to send trains out before sunset, and that it was sent out without his knowledge or consent. Mr. Newell says he wrote Mr. McClellan that "it was out of the question to run any solid coal trains on Sunday, even if there be a congestion. In view of the fact we have additional power to handle the business currently, it should not be necessary to run trains of this nature on Sunday. We have recently had some complication on this account, and I hope you will see that these instructions are enforced."

But taking the defendant's own evidence to be true, the instructions were *not* enforced and the train was permitted to be made up and sent out from Rocky Mount and was run on Sunday by Wilson and on towards Florence. It was "permitted" because the official who could have prevented it and who could and should have stopped the train did not do so. *State v. Probasco,* 62 Iowa, 400; *Ter. v. Stone,* 2 Dak., 155; *Com. v. Curtis,* 91 Mass., 266. It was his duty to do so, for he says he was instructed to enforce the order. His failure to do so "permitted" the train to run. The "permitting" the train to run by Newell and McClellan was "permitting" by the company—if their conduct had been all that made the corporation liable. But there was more than permission. There was the wilful act of the company when its four officials at Rocky Mount, "charged with the duty of making up and sending out trains" from that point, sent out this train. Their act was the act of the company. The State cannot be called upon to prove that an act was done by a defendant's permission when it shows that it was the intentional act of the defendant itself. A corporation acts by its agents. Their wilful act in the discharge of a duty entrusted to them is the act of the corporation. If they disobeyed an imperative order from those "higher up" it was permissive as to those higher officials who did not supervise their department and enforce their orders, but none the less is the company responsible. There is no explanation why the four officials at Rocky Mount should have broken their own rest on Sunday and violated the law by breaking the rest of the engineer and train crew on that holiday, with no possible motive suggested for risking their positions by disobedience of orders. No reprimand or punishment is suggested to have fallen upon these four officials.

Not only did they, in the scope of their powers, send out this train without let or hindrance from McClellan and Newell (and therefore by their "permitting" it to be done), but the engineer and crew in running the train were acting in their sphere, and under the orders of those charged with the duty of ordering them. Their intentional act, in the scope of their duties, is the intentional act of the company. No "permitting" need be shown when the running was intentional. The train passed through Elm City only by the act of another agent of the company, acting within his sphere in turning the white or safety end of the switch out and permitting the train to pass, and the same is true of the agent at Wilson, and possibly of the agent at Sharpsburg. *Stewart v. R. R.,* 141 N. C., 271.

Thus agent after agent of the defendant company, acting in the scope of his duties, concurred in starting and running this train on Sunday. They did this act, not merely by permission, but the engineer and crew did so under orders, and for the conduct of its agents the defendant is responsible. If there had been injury by the negligence of either one of these numerous agents, the company would have been liable for that reason. Taking cognizance of the matters and knowledge "acquired by their observation and experience in every day life," as we hold a jury can do (*Wright v. R. R.*, 127 N. C., 227; *Lloyd v. R. R.,* 118 N. C., 1013; *Deans v.*

R. R., 107 N. C., 693) this jury might well infer that other and higher officials had cognizance of and caused this train to start and keep on. There must have been reports by telegraph to Wilmington and response from the office at the headquarters there to avoid collision with other trains. *Stewart v. R. R., supra.*

As to these two officials, Newell and McClellan, while they testify to having given orders, they do not testify to any effort whatever to put the order in force. The running of the trains, which it was their duty to know of and prevent, without any effort shown on their part to prevent, was "permitting" it, by the corporation, so far as the conduct of these officials was concerned, who could have stopped it and did not.

This law was enacted in 1879, nearly 30 years ago, to secure to some part of the employees of railroads a rest for a part—8 or 9 or 10 hours, according to the season—on the Sabbath day. These employees cannot move to secure their rights under this law with safety to their positions. They are helpless before so great powers as these great corporations can exert unless the law comes to their aid.

This jury from common observation knew that this was not an accidental train, by mistake run before sunset on that Sunday. It was in evidence before them, in this very case, that the defendant was an habitual criminal in this respect, for at the court ending the day before this train was run the defendant was convicted on two indictments for this offense and a *nol pros* was entered on a third indictment on defendant "agreeing" to stop "running its trains on Sunday in violation of law."

The charge of the Court therefore was not error, for, if defendant's own evidence alone was believed, this train was run by orders of those empowered to send out trains, and by the permission of those who could have stopped it, and did not.

STATE v. SHINE.

(Filed 19 November, 1908).

1. **Indictment — Misdemeanor —"Feloniously"—"Second Offense"—Surplusage.**

   When the word "feloniously" is used in a bill of indictment for an offense which the statute makes a misdemeanor, it, and a charge of "guilty of a second offense," are regarded as surplusage.

2. **Legislative Power—"Recorder's Court"—Jurisdiction, Defined—Constitutional Law.**

   The Legislature has the constitutional power to create a "recorder's court" of a city, giving it original jurisdiction over all criminal offenses below that of felony, and declare them to be "petty misdemeanors."

3. **Same—Appeal—Trial by Jury.**

   When a legislative act creates a court of original jurisdiction for the trial of petty misdemeanors, and prescribes an appeal to the Superior Court, the constitutional right of trial by jury is preserved.

4. **Legislative Powers—Courts—Appeal—Grand Jury—Constitutional Law.**

   No valid objection can be raised to the constitutionality of a court created by the Legislature, preserving the right of appeal to the Superior Court, because a grand jury is not the first to pass upon a bill of indictment charging the offense.

ACTION tried before *Long, J.*, and a jury, August Criminal Term, 1908, of UNION. Defendant appealed.

Assistant Attorney-General Hayden Clement for the State.
Redwine & Sikes for defendant.

CLARK, C. J. The defendant was tried in the Superior Court upon appeal from the recorder's court of Monroe. The offense charged was retailing spirituous liquor. In the warrant, it was charged that the offense had been committed unlawfully, wilfully and "feloniously." The punishment prescribed is that of a misdemeanor (Rev. 3291) and that fixes the grade of the offense, *State v. Fesperman,* 108 N. C., 770; *State v. Lytle,* 138 N. C., 744. The word "feloniously" must therefore be treated as surplusage (*State v. Edwards,* 90 N. C., 710, and cases there cited) as must also the allegation that the defendant was "guilty of a second offense." The unnecessary words did not vitiate. *State v. Fain,* 106 N. C., 766; *State v. Hart,* 116 N. C., 978; *State v. Darden,* 117 N. C., 697. Besides, on appeal, his Honor permitted the warrant to be amended, as he had the right to do, Rev., sec. 1468, by striking out these superfluous words, and still "sufficient matter appears in the bill to permit the court to proceed to judgment," Rev., sec. 3254, for an offense under Laws of 1905, ch. 497, sec. 12.

Laws 1907, ch. 860, sec. 4 (5), creating the recorder's court of Monroe, provides that: "Said court shall have exclusive original jurisdiction to hear and determine all other criminal offenses committed within the county of Union below the grade of a felony as now defined by law, and all other such offenses committed within the county of Union are hereby declared to be petty misdemeanors."

The Constitution, Art. IV, sec. 12, gives to the General Assembly express power to allot and distribute the jurisdiction below the Supreme Court, among the other courts prescribed in the Constitution, or which may be created by the legislature, in such manner as it may deem best, if done without conflict with other provisions of this Constitution. In pursuance of this provision, the General Assembly created criminal courts, with right of appeal direct to this Court. This, we were compelled to hold, was "in conflict with other provisions of this Constitution." *Rhyne v. Lipscombe,* 122 N. C., 650; *Tate v. Commissioners, ib.,* 661.

In response to the public needs and a general public demand for courts that could make speedy and inexpensive trial of lesser offenses, the General Assembly thereupon instituted the policy of establishing courts for the trial of petty misdemeanors, without jury, preserving the right to a jury trial by giving the right of appeal with a trial *de novo* in the Superior Court.

This was assailed by attacking the statute creating the Police Court of Asheville, but it was held constitutional in *State v. Lytle*, 138 N. C., 738, after the fullest consideration. It was there held at pp. 743, 744, that the General Assembly, having transferred high misdemeanors into the grade of felony, was acting in the scope of its powers in classing all other misdemeanors as petty misdemeanors. This not only complies with the words and spirit of the Constitution, but a party who has been tried before one of these courts, with opportunity to answer, has been put to no disadvantage as compared with those whose first hearing is before the grand jury, where neither he nor his witnesses have any opportunity to be heard. The right of appeal preserves the right of trial by jury. *State v. Jones*, 139 N. C., 618; and *State v. Brittain*, 143 N. C., 670, citing with approval *State v. Lytle*, *supra*. Though the defendant was sentenced to twelve months on the roads, he was convicted of a misdemeanor only, and had his trial before jury and judge in the Superior Court.

In *State v. Baskerville*, 141 N. C., 818, this Court sustained the constitutionality of the act creating the Police Court of Raleigh, which conferred upon such court "power and jurisdiction over all misdemeanors committed within the corporate limits" of Raleigh or in Raleigh Township.

The Police Court of Winston was upheld in *State v. Jones*, 145 N. C., 460, though its constitutionality was assailed on the same ground, as here, that there was no indictment found by a grand jury. The offense there charged was a "petty misdemeanor for larceny of goods less than $10.00 in value." The Court said the "same point has been fully discussed and settled in *State v. Lytle*, 138 N. C., 738." We regard the matter as settled.

No error.

STATE v. CHARLES STRATFORD and SUE WATTS.

(Filed 19 November, 1908).

1. **Murder—Evidence—Threats Previously Made.**

Upon trial under indictment for murder, evidence is competent of threats made by prisoner against the deceased two weeks before the homicide.

2. **Murder—Conspiracy—Relationship—Evidence—Jealousy.**

The defendants, a man and woman, were tried for murder and both convicted, there being evidence that the former procured the latter to do the act, or conspired with her to that end. *Held*, evidence that prisoner and deceased were in lewd intimacy with *feme* defendant was competent both as showing her relationship with the defendant and jealousy as a motive for the homicide.

3. **Murder—Evidence of One Offense—Instructions—Guilty of Certain Offense or Acquittal.**

When, under an indictment for murder, the solicitor has elected not to prosecute for the capital offense, and the evidence points either to suicide of deceased or killing with premeditation of the prisoner, it was not error in the lower Court to charge the jury that they must render a verdict of guilty of murder in the second degree, or of acquittal.

4. **Evidence, Circumstantial — Motive — Instructions — Harmless Error.**

It is not necessary to prove motive in order to convict upon a trial for murder, but when circumstantial evidence is relied on, it may be shown to strengthen the chain of circumstances tending to establish guilt; where the trial Judge charged that motive was a strong circumstance pointing to guilt, but also charged that failure to show motive was a strong circumstance pointing to innocence, no error prejudicial to defendant's right was committed.

Assistant Attorney-General Clement for the State.
Adams, Jerome & Armfield for defendants.

CLARK, C. J. The prisoner and Sue Watts were indicted for the murder of Thomas Furr. The Solicitor elected not to prosecute for the capital offence. Both prisoners were convicted of murder in the second degree. Stratford only appealed. His exceptions are:

Exception 1. Refusal to strike out evidence of threats made by Stratford two weeks before the homicide. Evidence of threats made much longer before the homicide were held competent in *State v. Exum,* 138 N. C., 605.

Exception 2. Evidence of statements of prisoner tending to show that he and deceased were in lewd intimacy with Sue Watts was competent, both as showing her relationship with Stratford, and in connection with other evidence tending to show jealousy as a motive.

Exceptions 3, 5 and 7 are to his Honor's instructions that the jury could not find prisoner guilty of manslaughter, but they should find him guilty either of murder in the second degree or not guilty. This instruction was correct. The evidence pointed either to death by suicide or a killing by premeditation, the prisoner either advising or procuring Sue Watts to kill deceased, or conspiring with her to do so. There was no evidence tending to prove manslaughter.

Exception 4. That the Court gave the following charge, at request of Sue Watts: "A motive proven against one charged with a crime of this character is a strong circumstance pointing to guilt. The failure to prove motive in a case like this is a strong circumstance to be considered by the jury in favor of the prisoner." It is true that it is not necessary to prove motive, *State v. Turner,* 143 N. C., 642, but in a case of circumstantial evidence it is permissible to thus strengthen the chain of circumstances. *State v. Green,* 92 N. C., 779; *State v. Adams,* 138 N. C., 697. The word "strong" might have been omitted, but it was given in the alternative in favor of the prisoners as well as in that against them. We cannot perceive any prejudice done the prisoner.

Exceptions 6 and 8 are to giving certain contentions of the State. They were, however, warranted by the evidence. The Court was favorable to the appellant in permitting him to offer proof of an alibi which was immaterial if the State's theory of conspiring, which was submitted to the jury, was found by the jury.

Exception 9. That the Court refused appellant's prayer to instruct the jury to render a verdict of not guilty "because there was no evidence," is without merit, and requires no discussion of the evidence. It is not necessary to set it forth.

No error.

STATE v. FULTON.

(Filed 25 November, 1908).

1. **Husband and Wife—Slander—Indictment of Husband.**
   Held by CLARK, C. J., and WALKER and CONNOR, JJ.: A husband is indictable, under Revisal, sec. 3640, if he wantonly and maliciously slander his wife. (*State v. Edens*, 85 N. C., 522, is overruled).
2. **Same.**
   Held by WALKER, J., that by reason of the decision in *State v. Edens, supra*, the bill against defendant herein was properly quashed, though offenders will be punishable. (Following *State v. Bell*, 136 N. C., 674).
3. **Same.**
   Held by BROWN and HOKE, JJ., the bill herein was properly quashed, because a husband who slanders his wife is not indictable under Revisal, sec. 3640, as heretofore held in *State v. Edens*.
4. **Same.**
   The judgment of the Superior Court quashing the bill is affirmed.

ACTION heard by *Webb, J.*, March Term, 1908, of GUILFORD, brought by the State against the defendant for slandering Carrie Fulton, his wife, under sec. 3640 of the Revisal of 1905.

Before pleading the defendant, through his attorneys, moved to quash the bill of indictment for the reason that no offence was charged, it not being a criminal offence for a husband to slander his wife. His Honor sustained the motion, quashed the bill of indictment, and the State appealed.

Assistant Attorney-General Clement, Shaw & Hines, W. P. Bynum, Jr., and *Justice & Broadhurst* for the State.

David Stern, King & Kimball and *W. F. Carter* for defendant.

BROWN, J. It is admitted by the learned counsel for the State that this Court has long since decided that a husband is not indictable for slandering his wife under our statute, *State v. Edens*, 95 N. C., 693, and we are asked to overrule that decision.

It was in 1886 that the eminent jurists who occupied this bench at that time held, unanimously, that our statutory enactment creating the offence of slandering an innocent woman does not embrace those persons who sustain marital relations to each other, and that its operation is confined to those not thus related.

In speaking of the long established policy of the law as bearing upon the married relation, *Chief Justice Smith* eloquently says: "In other cases, short of these extremes, it drops the curtain upon scenes of domestic life, preferring not to take cognizance of what transpires within that circle, to the exposure of them in a public prosecution. It presumes that acts of wrong committed in passion will be followed by contrition and atonement in a cooler moment, and forgiveness will blot it out of memory. So, too, the harsh and cruel word that sends a pang to the sensitive heart may be recalled, and relations that should never have been interrupted by an unkind or unwarranted expression again restored. The unnumbered mischiefs that might flow from making an unguarded and false imputation upon the wife's chastity the subject of a criminal proceeding are so obvious that we cannot think the General Assembly intended such a possible result."

The decision made by a court composed of sages of the law who were as chivalrous as they were pure and learned, has become a part of the statute, and has been lived up to and acted upon since 1886.

For twenty-two years the General Assembly has acquiesced in such construction and thereby approved it. It is a well known fact that the last Legislature voted down a bill to change it.

The decision has been cited as authority and with approval in subsequent cases in this Court. *State v. Lewis,* 107 N. C., 972; *State v. Haddock,* 109 N. C., 873.

Whatever might be our impressions were the matter *res integra,* we deem it important in the construction of statutes to adhere to what has already been adjudged. The judicial interpretation becomes as it were a part of the statute itself.

This view of the case is presented very strongly by *Justice Walker* in *Hill v. R. R.,* 143 N. C., 574; *Ash v. Gray,* 90 N. C., 296; *Lockhart v. Bell,* 90 N. C., 500; Wells' Res Adjudicata, pp. 542, 543.

The judgment of our predecessors has abundant support in the decisions of other courts and in the text-books.

Mr. McLean, an approved writer on Criminal Law, sec. 1045, says: "A husband is not indictable for defaming his wife, and it has been so held in England, notwithstanding the Married Woman's Act."

In support of the text the author cites the decision of this Court in *State v. Edens, supra.*

There is a statute of New York, as broad and comprehensive as the one construed in *Edens' case,* which says: "Any married woman may maintain an action in her own name for damages against *any person,* for an injury to her person and character, the same as if she were sole."

It was insisted in *Freethy v. Freethy,* 42 Barb., N. Y., 641, that the words, "any person," are so comprehensive as to include the husband, and give the right to the plaintiff to maintain an action for slander against the defendant, her husband.

The New York Court held that the Legislature did not intend by so general a statute to change the common law rule as to the disability of husband and wife to sue each other, saying that the evils to be remedied "are but trifling when compared with such as would result from the litigation between them of suits like the one in question. When the legislature intends to make such a striking innovation of the rules of the common law, and so much opposed to public policy and the peace and happiness of the conjugal relation, as would be the case if husband and wife were permitted to sue each other for alleged wrongs to character, it should use such language as will make it clearly manifest; and not leave it to the construction of the courts."

It is a rule of construction, generally recognized, that statutes should receive such interpretation as is agreeable to the rules of the common law in cases of that nature, for statutes are not presumed to alter the common law further than the act expressly declares. Bac. Abr., p. 243.

It is not enough that a case be within the letter of the statute, if it be not also within the intention and spirit of it. Numerous cases can be found in the books where an act came within the letter of the statute, but was declared not to be within its intention. 2 Bac. Abr., 249; 9 Bac. Abr., 250; 2 Inst., 384; *People v. Ins. Co.,* 15 John., 358; *White v. Wager,* 25 N. Y., 328.

It would be a legal anomaly to hold that the husband may be convicted and punished for slandering his wife, and that she could not sue and recover damages for the wrong done her.

The Married Woman's Act enacted by the English Parliament in 1882, 45 and 46 Vict. C., sec. 12, gives to a wife remedies by criminal proceedings for her protection, and the protection of her property. She can also sue in her own name for torts and wrongs done to her. Yet, the Queen's Bench held that a wife could not before, and cannot since the aforesaid act, take out criminal proceedings against her husband for defamatory libel. The *Queen v. Lord Mayor,* 16 Q. B. Div. Law Rep., 772.

From the earliest times it has been held that the wife cannot be convicted for stealing her husband's goods, the reason being that husband and wife were considered but as one person in law. 1 Hale P. C., p. 514. Upon this subject the Encyclopædia lays it down, that the common law unity of husband and wife operates equally to preclude either spouse from successfully maintaining actions for tort, such as slander and libel against the other. 15 Am. & Eng., 857.

By statute in many States the right is given to husband and wife to sue each other for injuries to property or rights growing out of property, but in such States no adjudications can be found, so far as we are advised, which authorize such actions for slander, libel and other similar torts. 15 Am. & Eng., 858.

There is another very cogent reason why the construction given this statute in the *Edens case* should be adhered to, and that is because the wife, whose character is at stake, cannot be permitted to testify against her husband upon the trial of the indictment. It being an indictment against the husband, he has the right to offer himself as a witness in his own defence, and under oath justify the charges he has made, and he could testify to facts that would blast the wife's character if believed. He could testify that he saw her in the act of adultery and the wife's lips are closed, for she is legally incompetent to testify against her husband when indicted for crime, except when charged with an assault and battery on her person, or for abandoning her or for neglecting to support her. Revisal, sec. 1635. There are no other exceptions to her statutory incompetency. This general disability of those occupying the marital relation to testify against each other is founded on the soundest principles of public policy, and has been recognized from the earliest times since the case of Lord Audley, 3 How. State Trials, 402.

So it is well known to the General Assembly that in indictments under the statute we are considering the husband can testify in his own defence, but the wife may not be called to contradict him, or to defend her own honor.

In an action for divorce neither husband or wife is permitted to testify concerning the adultery of the other, but under this indictment the husband can testify in his own behalf and prove adultery upon the part of his wife, while her mouth is sealed by the law. It is inconceivable that the General Assembly could leave the wife in any such cruel position while undertaking to legislate for her protection.

If the Legislature had intended to include husband and wife within the purview of this statute, doubtless it would have amended the law so as to make the wife a competent witness, as in the other cases, to prove the crime committed against her; not only to contradict her husband, but also to prove her own virtue and continence, an essential fact incumbent upon the State to affirmatively prove before a conviction can be had. Without the evidence of the wife the prosecution must be doomed to failure. Her evidence could scarcely be supplied.

We think it best to adhere to the judgment of our predecessors, and leave any change to be made by the Legislature, if in its wisdom any is deemed desirable.

If by legislation this statute should be extended so as to embrace those who are husband and wife, the law-making power can and will do the latter the plain justice to open the door, that she may be a competent witness in a proceeding where her honor is at stake. Three Justices having voted to quash the indictment, the judgment of the Superior Court is

Affirmed.

WALKER, J., concurring in the result: I concur with the Chief Justice and *Justice Connor* that a husband is indictable under the statute for wantonly and maliciously slandering his wife. I can conceive of no valid reason for withholding from her the protection of the statute. Such a slander is within the letter of the law and certainly is within its spirit. This prosecution is not like a civil action for slander. The offense is committed not so much against the wife as against the State. It is intended and has the effect to prevent breaches of the peace and the separation of husband and wife, rather than to encourage them, and is not at variance with any sound public policy. Such a slander would be a sufficient cause for a legal separation by civil action, and, if so, why not for a criminal prosecution. Suppose it had been a libel instead of a slander, could the husband publish such a libel with impunity? The authorities cited in the opinion of the Court, delivered by *Justice Brown*, seem to be based upon the idea of the unity or identity of husband and wife and hold, therefore, that the one cannot sue the other. Our statute authorizes an action by the wife against the husband, not only when it concerns her separate estate but in all other cases where she has a cause of action against him. Revisal, sec. 408. In *Phillips v. Barnet*, 1 Q. B., Div. 436, the Court, by *Blackburn, J.*, said: "This action (for assault) cannot be maintained. There is no doubt that if the wife receives bodily injury from the hands of her husband, he is liable to criminal proceedings for a felony or misdemeanor, as the case may be; and in the case of an ordinary assault it is quite clear that the wife has a right for her protection to obtain articles of the peace against her husband, and upon this and upon other occasions she is in law a separate person." *Lush, J.*, in the same case, said: "It may be safely laid down, I think, that neither can acquire any civil rights against the other, or apply to any civil court to enforce them. For her personal protection the wife may exhibit articles of the peace against her husband, but, in my opinion, her remedy does not extend to the bringing of an action against her husband." I can understand the reason for the common law denying to the wife a civil remedy against her husband, but why should the unity or identity of husband and wife prevent a criminal prosecution, in which the State is the prosecutor and not the wife, and the offense is against the public? She could not, at common law, sue her husband for an assault, but he could be indicted. Why should he not be indicted for an assault upon her character, which may be more grievous in its consequences to her than one upon her person? If, in the one case, an indictment will lie for the protection of her person, why should it not lie in the other, for the protection of her character? If it is said that an indictment for slander will tend "to interrupt the marital relation" and prevent the restoration of peace and harmony between the husband and wife, it may, with equal force, be asserted that an indictment for an assault would lead to the same result.

I concur in affirming the judgment, but not for the reasons assigned in the opinion of the Court, delivered by *Justice Brown*. The case, I think, is governed by the principle laid down in *State v. Bell,* 136 N. C., 674. As said in the opinion of the Court in the present case, "the judicial interpretation of a statute becomes, as it were, a part of the statute," and if that "interpretation" is afterwards changed or modified, the defendant should be tried under the law as it had been declared to be at the time the alleged offense was committed, simply because it was the law at that time. The defendant, it is true, has no vested right in a decision of this Court, but it does not follow that we should reverse our decisions and then declare that to be criminal which we had decided was not so at the time of the commission of the alleged offense. While I think a husband is indictable for slandering his wife, this Court had decided otherwise, and he is entitled to the benefit of the law as it existed at the time of the alleged offense. Any other view would be productive of great wrong and injustice.

The question I am now discussing was not raised by the defendants in *State v. Oliver,* and the other cases cited in the opinion of the Chief Justice. It is a mistake, I think, to suppose that *State v. Bell* was decided as it was because it involved the construction of a contract. It rests upon the principle I have already stated, namely, that a decision of this Court is the law until it is overruled, and the reversing decision should not be given retroactive effect, and also upon the ground that the overruled case had construed a statute, and the defendant, in committing the act alleged to be criminal, had the right to rely upon that decision as correctly declaring the law. The act charged to be criminal may, in some cases, not be *per se* wrong or involve in any degree moral turpitude, and if not forbidden by the law, it may be morally and legally right to do the act. Therefore if, in doing such an act, the defendant has relied on a decision of this Court that it is not legally wrong, why should he be punished as a criminal? The decisions of this Court do not merely settle controversies between parties, but we declare in them the law applicable generally, and for that reason they are held to be authoritative in other similar cases. We decide each case upon some general principle applicable to all like cases.

The Court, in *State v. Bell,* was construing a criminal statute and not a contract. This appears clearly from the following language: "While we recognize the duty of the Court to avoid overruling its decisions, we feel well assured that the language of the statute demands that we concur with his Honor's ruling and overrule our own decision in *Neal's case.* It is very desirable that the relative rights and duties of landlords and tenants be clearly defined. The statute is plain, and when it is understood that the Court will not encourage experimenting with it, both parties will recognize and respect the rights of each other. While we hold the law to be as stated, we are embarrassed in applying this ruling to this case. It may be that these defendants have acted upon the advice of counsel based upon the decision of this Court in *State v. Neal, supra.* If so, to try them by the law as herein announced would be an injustice." *State v. Bell,* 136 N. C., 676. The question of vested or contractual rights could not well have been involved. It was not the breach of a contract for which Neal and Bell were indicted, but the violation of the statute in removing a crop, and, therefore, the sole question involved was the true meaning of the statute. The question involved in *State v. Edens* was the construction of a statute, and what is the meaning of the same statute, is the question presented in this case.

If this Court adheres to its decision in *State v. Bell,* and that case is to continue as a precedent, it applies, in principle, to this case and, for that reason, I think the indictment should be quashed.

CLARK, C. J., dissenting: The indictment charges that the defendant "did unlawfully and wilfully, in a wanton and malicious manner, attempt to destroy the reputation of Carrie Fulton, his wife, being then and there an innocent and virtuous woman, by words spoken of and concerning the said Carrie Fulton, the wife of the said Winston Fulton, which amounted to a charge of incontinency against the said Carrie Fulton." The bill was quashed, and the State appealed. For the purpose of the appeal the charge must be taken as true, and the sole question is whether the facts constitute an indictable offense. The question cannot now arise whether the wife would be a competent witness to prove herself "an innocent and virtuous woman," nor how the offense can be proven if she is not a competent witness to that fact. Quashing a bill is like a demurrer that the complaint does not state a cause of action. The facts charged must be taken as true.

The indictment is drawn under Revisal, 3640.

The preamble which discloses the purpose of the Legislature in the passage of this act is as follows:

"Whereas, the very existence in society of innocent and unprotected women depends upon the unsullied purity of their characters; now, therefore, to protect them against persons who may attempt in a wanton and malicious manner to destroy their reputation the General Assembly of North Carolina do enact:" See chap. 156, Laws 1879.

The statute provides, that if *"any person"* shall attempt in a wanton and malicious manner to destroy the reputation of *"an innocent woman"* by words, written or spoken, which amount to a charge of incontinency, *"every person"* so offending shall be guilty of a misdemeanor. To sustain the quashing of this indictment, the Court is compelled to write into this statute several words which the Legislature did not put in it. The statute must be made to read, "If any person *(except a husband)* shall attempt in a wanton and malicious manner to destroy the reputation of 'an innocent and virtuous woman' (other than his wife) by words written or spoken, which amount to a charge of incontinency 'every person' *(except such husband)* shall be guilty of a misdemeanor."

It cannot be questioned that the Legislature could have written such words in the statute, but it did not do so. Whence then does this Court derive its authority to insert them?

It cannot be contended even that the insertion of those words improves the statute in any particular. When a "man who has promised at the altar to love, comfort, honor and keep his wife, in sickness and in health," attempts in a wanton and malicious manner to destroy her reputation by falsely and publicly charging her with incontinency it is more cowardly and damning than if he had so charged another woman who, perhaps, has a protector to whom her good name is "above rubies," and who stands ready to resent the charge. The wife is usually defenseless unless the husband defend her. Does the law therefore exempt her from the protection accorded to all other "innocent and virtuous" women? The statute, as written by the law-making body, does not deprive her of the protection accorded to any other innocent and virtuous woman. Why should the courts remake the statute and write into it so many words to give it that effect?

It is said that the law should "draw a veil over dealings between man and wife." But this is not such dealing, and even if it were, the law has "never drawn a veil" when her body is assaulted by her husband and serious injury inflicted. Why then should it be done when the injury inflicted is more cruel and abiding than the red welt of a husband's lash? It is true that for the aforesaid purpose of "drawing a veil over dealings between man and wife," for long centuries the husband was held authorized to inflict personal chastisement upon the wife, provided "no serious bodily harm or permanent injury were inflicted" or, as some decisions phrased it, "if the rod used was not larger than the husband's thumb." But in *State v. Oliver*, 70 N. C., 61, this Court overruled numerous decisions to that effect, *Settle, J.*, saying, "The Courts have advanced from that barbarism until they have reached the position that the husband has no right to chastise his wife under any circumstances."

Our courts were slow to reach this position, having held just the opposite as late as *State v. Rhodes*, 61 N. C., 453 (1868), in which the Judge below charged that a man had a right to whip his wife with a switch no larger than his thumb, and on appeal it was held "no error," and *State v. Rhodes* was cited and approved in *State v. Mabrey*, 64 N. C., 593 (1870). "Having advanced from that barbarism" by the ruling in *State v. Oliver*, 70 N. C., 61, the latter case was reaffirmed in *State v. Dowell*, 106 N. C., 724, and no one now questions that a husband is liable for an assault if he chastises his wife "under any circumstances whatever."

If the Court will no longer "draw the veil over dealings between man and wife," *i. e.*, will not leave the wife outside the protection of the law in such matters as leave no permanent injury and may be sometimes forgiven and forgotten, why should it "outlaw" a woman when the very gist of the offense against her is its publicity, and its very nature such that neither she nor the public can forget it?

It is said, however, that this Court has held that the husband was not liable for slandering his wife in *State v. Edens*, 95 N. C., 693. But, as we have seen, the statute contains no words exempting the husband from liability under, nor depriving the wife of the protection of, the statute. Centuries of uniform decisions did not preserve to husbands a vested interest in the right "to whip their wives with a switch no larger than the husband's thumb." And one single decision, not warranted by the terms of the statute and, in fact, contrary to it, cannot confer upon the defendant or any other husband a "vested right" to slander his wife by falsely and maliciously charging her with a want of that womanly virtue without which she is an outcast in society.

Besides, an examination of *State v. Edens* shows that it is based upon the very reasoning used in *State v. Rhodes* and similar cases, and that it contains no reference whatever to the subsequent case of *State v. Oliver,* 70 N. C., 61, which had overruled the previous cases and denied the soundness of the reasons which had been given in them for depriving the wife "of the equal protection of the laws." *State v. Edens* has been referred to since, but has been approved on this point *by no case whatever.* It stands alone.

It may be noted also that even the old line of cases, which were repudiated as "barbarism," in *State v. Oliver,* 70 N. C., 61, held a husband liable for an assault when it was not of a trifling nature, but serious, or the assault was made in a wanton and malicious manner, as threatening with a deadly weapon (which inferred malice) though no damage was done. *State v. Davidson,* 77 N. C., 522.

So that, even under the reasoning in the old line of cases now discarded as "barbarous," the Court would not "draw a veil" to deprive a woman of the protection of the law, when the damage done was of a serious nature (as is a public charge of a want of chastity) and the injury is wanton and malicious.

Statutes making slander of woman indictable are a recent development, and the protection intended should be as broad as the spirit which caused their enactment. They should protect all innocent and virtuous women, and against all lying and malicious tongues whatsoever.

For the old doctrine that a man had a right to thrash his wife whenever he pleased, provided he did not "use a switch larger than his thumb," or did not "do serious bodily harm or inflict permanent injury," three reasons were given, none of which justify giving the husband privilege and immunity "to wantonly and maliciously destroy his wife's reputation by false charges of adultery." It was said:

1. It is the "husband's duty to make the wife behave herself" and thrash her if necessary to that end, as *Pearson, C. J.*, held in *State v. Black*, 60 N. C., 263. But it has no tendency to "make her behave herself" to falsely and maliciously scatter abroad charges of adultery against her to "destroy her reputation."

2. "To draw a veil over dealings between man and wife," the idea being that a little wholesome chastising, to "make her behave herself," privately administered, would make less noise and scandal than the publicity of a court trial. But to attack the *reputation* of a wife by charges of adultery is publicity, and to make doing so falsely and maliciously punishable is to prevent such scandal and publicity. It is not, like the thrashing, a "dealing between man and wife," or done for any possible motive of his "making her behave," but to attempt to destroy her reputation is a dealing by the man

with the public, and the act must be proven to have been done wantonly and maliciously, or there can be no conviction.

3. That there was a long line of decisions giving the husband privilege and immunity to inflict chastisement. But there is only one case that has ever held he can, with impunity, "falsely and maliciously" slander her.

As notwithstanding the three above given most excellent reasons set out in the old decisions, a husband is no longer privileged to chastise his wife, in moderation, why should we hold that he is privileged to slander her when not one of these reasons apply to slander of the wife?

To the credit of husbands, few cases presenting this point have arisen. Indeed, *Slayton v. The State,* 108 Am. St. 988; 46 Tex. Crim. Appeals, 205, appears to be the only case, except *State v. Edens,* in which it has arisen in this country, and, in *Slayton's case,* upon a statute almost identical with ours, it was held that the husband was liable for maliciously and wantonly slandering his wife. We will search in vain for any good reason why he should not be. We shall certainly find no reason for so holding in the words of the statute. That does not except him. Under our present humane laws, a man will not be allowed to "wantonly and maliciously" injure his horse or his dog that belongs to him. Is his wife in worse condition?

Should it be difficult to enforce the statute against the husband, in such cases, because the wife may not be a competent witness to prove her own chastity (as to which we express no opinion) it rests with the Legislature to remedy that defect, if it exists, if it shall see proper.

The misconception of the statute in *State v. Edens* did not repeal it or give the defendant a vested right to slander his wife. Should he be convicted and the Judge find that the defendant would not have wantonly and maliciously attempted to destroy his wife's reputation, by falsely charging her with adultery, but for his knowledge of *State v. Edens,* and therefore, supposing that he was immune from punishment, the Judge can give that fact such weight as he thinks proper in imposing sentence, or the governor can do so in passing upon a petition for pardon or commutation. But what we now declare the meaning of the statute to be is a declaration of what it meant when passed. The defendant Edens is the only person entitled to be protected by the erroneous construction placed on the statute in his case.

Oliver was held guilty of assault in whipping his wife (*State v. Oliver,* 70 N. C., 61), though for centuries it had been erroneously held that he could do, with impunity, exactly what he did. Indeed, *Pearson, C. J.*, had very recently repeated the old decisions in *State v. Black,* 60 N. C., 264, and *Reade, J.,* in two cases above cited, *State v. Rhodes,* 61 N. C., 453, and *State v. Mabrey,* 64 N. C., 592. Yet both these Judges concurred in *State v. Oliver* in overruling these cases.

In *Mial v. Ellington,* 134 N. C., 131, we held that Mial was entitled to his office though this Court had held otherwise for seventy years. It would lead to insuperable embarrassments to hold that an inadvertent decision of a Court is a contract with the public. In *State v. Bell,* 136 N. C., 677, *Connor, J.*, puts the decision on the ground that the overruled decision rested on the construction of a contract.

Three Judges in their opinion filed in this case hold, that under Revisal, sec. 3640, a husband who "wantonly and maliciously attempts to destroy the reputation of an innocent woman" is indictable even though such "innocent woman" happens to be his wife. *State v. Edens,* 85 N. C., 522, is overruled. Nothing else appearing the judgment of the Court below quashing the bill must be reversed. In the opinion filed by only one member of the Court it is held (and no concurrence therein is expressed in any other opinion) that the overruled decision is a bar and protection against an indictment. It would seem logically and necessarily to follow that the quashing of the bill should be reversed. See *per curiam* at end of opinions in *Stewart v. Lumber Co.,* 146 N. C., 116.

CONNOR, J., dissenting: Slander was not indictable at common law in England, and was not made so in North Carolina until the enactment of the statute of 1879. Rev., sec. 3640. We are not advised whether, by an act of Parliament, it is made criminal in England. We are, therefore, without any direct authority based upon decisions declaratory of the common law, in regard to the liability of the husband to indictment for slandering his wife. The statute under which defendant is indicted declares that: "*If any person shall,*" etc. . . . . "to destroy," etc., and in conclusion: "*Every person so offending,*" etc. This language is not open to construction or interpretation. There can be no possible doubt that, unless there be some controlling reason to the contrary, the Court must enforce the statute as it is written. We have no power to write exceptions into it, unless manifestly necessary to effectuate an intention of the Legislature contrary to the plain and well settled meaning of the language used by it. I concede that the words "any person" do not include such persons as are incapable of committing the crime, as are *doli incapax*, either for want of understanding or immature age. This, however, must be made to appear upon plea of not guilty and not by motion to quash. No such question arises here. We are asked to find a legislative intention to exclude the husband notwithstanding the comprehensive language used. This contention is based upon the proposition that, by the common law, the husband was not liable to indictment for slandering his wife. The fallacy of the contention, to my mind, arises out of the assumption of the fact that such was the common law in this State, *at the time the statute was enacted.* There is no suggestion that, notwithstanding the common law, the Legislature had not the power to include the husband. The argument is that we must find that it did not *intend to do so,* because, in the absence of language expressly changing the common law, we must say that it was not so intended. Without conceding that the rule of construction invoked would carry us so far, I do concede that the rule is correctly stated in the opinion of *Mr. Justice Brown.* I find it well and more strongly stated by *Chief Justice Taylor* in *Kitchin v. Tyson*, 7 N. C., 314. "When a statute makes use of a word, the meaning of which was well ascertained at common law, the word shall be understood in the same sense it was at common law." I further concede, as said by the *Chief Justice,* "that when the provision of a statute is general, it is subject to the control and order of the common law." *Ib.* With this concession I submit that, neither in England, prior to the separation of the Colony and the organization of the State, nor in North Carolina, since its existence as a State, can it be shown by judicial decision that a husband was not indictable for a "wanton and malicious" injury to his wife. It is true, those who builded the common law were rude of speech and not so gallant of manner as their Norman neighbors, but they abhorred fraud, covin and malice, and punished with severity crimes prompted by either. The only offense against the wife, by the husband, in regard to which authority in the old books on criminal law is found, is an assault. It is sought, by analogy, to hold that, if the husband was not indictable for a simple assault, he should not be for a malicious slander of his wife. This is a large conclusion to draw from so small a premise—but the premise itself is not sound. *Mr. Justice Reade,* in *State v. Rhodes*, 61 N. C., 453, traces the history of the common law, in that respect, from Blackstone's statement "that the husband, by the old law, might give the wife moderate correction, for, as he was to answer for her behavior, he ought to have the power to control her, but that, in the polite reign of Charles the Second, this power of correction began to be doubted." I Blk., 444. The learned Justice, after noticing the trend of thought and the authorities on the subject, concludes: "The old law of moderate correction has been questioned even in England and has been repudiated in Ireland and Scotland." Whatever doubt was left by the decision of that case, as to the common law in North Carolina, was removed by the unanimous decision in *State v. Oliver,* 70 N. C., 60 (1874), wherein it was declared that a husband had no right to whip his wife, without regard to the animus, weapon used, or injury inflicted. This was, therefore, the common law in this State when, in 1879, the Legislature enacted the statute declaring that: "If any person," etc., and that: "Every person so offending," etc. It is undoubtedly true that when we seek to know the common law, we go to the "storehouse of reason and good sense" found in the writings of the sages of the law in England, "but since courts have had existence in America, they have never hesitated to take upon themselves the responsibility of saying what *is* the common law, notwithstanding current English decisions." *Sayward v. Carlson,* 1 Wash., 29; *Livingston v. Jefferson,* 1 Brock, 203, by *Marshall, C. J.* This must be true, otherwise, "as society becomes more complex and new demands are made upon the law by reason of new circumstances," the courts would find themselves unable to give expression to the sense of right and justice in private law, or the public safety and welfare in public law, until the English courts saw fit to change their decisions or the State Legislature to make new statutes. While judges diligently seek to find the law and the reasons upon which it is founded, by reference to the decisions of other courts and the conclusions drawn by commentators, yet, in a certain sense, each State has a common law of its own, based upon the conditions and necessities of its own people. In so far as it can be done, it is desirable to have the common law of the American States uniform, and to that end the judges consult the opinions of the courts of other States, giving to them such weight as, in their opinion, they are entitled, as persuasive or convincing as to what the law is. In this way "the law works itself pure." Conceding that we must look to the common law to ascertain whether the Legislature of this State in 1879 intended, when it used the words "any person," to exclude husbands charged with slandering their wives, we find that, by that rule of construction, a husband was indictable for an assault upon his wife whether malicious or otherwise. To write into the statute making a malicious slander indictable, an exception in favor of the husband, when for a simple assault he was indictable, would be, I submit, doing violence to the rule of construction invoked by the defendant and the plain language of the statute. I do not think it within our province or power to write the exception into the statute, because, in our opinion, public policy would be thereby promoted. This would be to invade the province of the Legislature. While I hold, as a cardinal and essential truth in our system of government, that it is the imperative duty of the Court to declare invalid any statute which does not conform to the supreme law, I hold with equal tenacity that the Court has no power to change the written law when within constitutional limitations, or to listen to persuasive suggestions of public policy or general good, when invited to construe statutes, the meaning of which is so plain that he who runs may read. To do this produces confusion, and destroys the symmetry of our constitutional system of government. If, however, I were permitted to enter into this field of thought, I should reach conclusions essentially different from those of *Mr. Justice Brown.* To my mind, the decision produces a singular anomaly in our jurisprudence. The husband may, with impunity, maliciously slander his wife, but if he lay the weight of his hand upon her in anger, he is indictable. I submit that this is not the "perfection of human reason," nor is it in accord with the intelligent sentiment of our people, in the light of the civilization of the twentieth century. It is not claimed that any Legislature has so declared otherwise than by judicial construction. But we are confronted with an express decision of this Court in *State v. Edens*, 95 N. C., 693, made by judges of great learning, eminent wisdom and large experience, holding that the Legislature did not intend to include the husband in the statute, and that he was not indictable for violating its provisions when his wife was the person slandered. I freely concede all that is so well said by *Mr. Justice Brown* in regard to the weight to be given the decision of this Court in that case. I also concede that we should regard it as an authentic declaration of the intention of the Legislature, unless, upon the most careful consideration, we are fully convinced that such decision is not in accordance with sound principle or controlling authority. With the utmost respect for the learned judges who decided *Edens' case,* I find myself impelled, after most anxious consideration, to conclude that the decision is not in harmony with the express language of the statute or the principle of the common law as declared by this Court. I do not think that the legislation regarding the property rights of married women affects the question. I am impressed with the fact that the *Chief Justice,* in *Edens' case,* overlooks *Oliver's case,* and says that the husband is indictable for an assault on his wife only "when the battery is so great and excessive as to put life and limb in peril, or when permanent injury to the person is inflicted, or *when it is prompted by a malicious and wrongful spirit.*" (Italics mine.)

While, as we have seen, this is in direct opposition to the decision in *Oliver's case,* it would seem a legitimate conclusion to draw, that if the injury done the wife by the husband is "prompted by a malicious and wrongful spirit," he is indictable, I am unable to see any valid reason for holding that if he assault her person, being prompted by malice, he is liable, whereas, if he assault her character, being prompted by the same malicious and wrongful spirit, he is not so. Certainly her fair name and reputation is as sacred, both to her and to the State, as her person. To protect one from the assault of the husband and leave the other to his wanton and malicious attack, is consistent with neither her rights nor the welfare of society. The reason upon which the courts refuse to take cognizance of trivial disputes between husband and wife, beginning and ending in the privacy of the home, deeming it wiser and more conducive to the peace and happiness of families, utterly fails when the husband wantonly and maliciously and with intent to injure her, utters and publishes false and defamatory slanders against her. It is here impossible to "draw the curtain" and conceal from public gaze the wrong which is done. This crime is never committed in "domestic privacy." It is said that to hold the husband amenable to indictment tends to prevent a reconciliation. I submit that to restrain men from committing the great wrong—giving expression to his malice—will better protect the sanctity of the home, the peace of the family, the good name of the wife and children and the welfare of society, than to grant him immunity to do the wrong and trust to the forgiveness of the injured wife for reconciliation. Again, it is not the wife alone who is injured by the malicious slander, but the State is offended, the public peace is endangered. What is more calculated to produce violence and disturbance than to suffer a husband, whose mind and heart are made the home of malice, to go abroad slandering his innocent wife? It is unnecessary to further pursue the subject. I cannot doubt that the Legislature intended what it said and, so thinking, I can find no warrant from any point of view to write an exception into the statute, giving the husband a right to maliciously slander his innocent wife with impunity. It is said that to so hold puts the wife at a disadvantage, because the statute, Rev., sec. 1635, does not permit her to testify in her own behalf. Obvious answers occur to my mind. We have no right to make exceptions in our statute because the Legislature has not provided what we may think an effective mode of proving the crime. It is not within our province to say how the proof shall be made. If the rules of evidence are defective, it is the duty, and, we doubt not, will be the pleasure of the Legislature to change them. Again, this question is not before us. The defendant demurs to the indictment, hence, for the purpose of passing upon the appeal, we must treat the *fact* as admitted. In a motion to quash, or in arrest of judgment based upon the insufficiency of the bill, the only question presented is whether an indictable offense is charged.

For the purpose of disposing of this appeal, the substantive elements of the offence are to be taken as admitted. I am of the opinion that his Honor was in error in quashing the bill. While I do not think that the question decided in *State v. Bell,* 136 N. C., 674, is presented here, I deem it proper to say that, having written the opinion in that case, upon further consideration, I do not think that the decision is consistent with, or sustained by, reason or the best considered authorities. It seemed probable that, in view of the peculiar facts of that case and the evident hardship imposed upon the defendant by reason of a misunderstanding of his rights, under the contract with his landlord, he was misled by the decision in *Neal's case.* I do not care to enter into further discussion of that question at this time, and only mention it in deference to the opinion of *Mr. Justice Walker*, and because I think frankness makes it proper to say this much. It was one of those hard cases which are said to be "the quicksands of the law." I do not think it should be extended or applied to the wanton and malicious slander with intent to destroy the reputation of an innocent woman.

I have felt impelled to express my views in this case because of its importance as a step in the development in the common law upon this subject. To the credit of our people, be it said that but few cases have been presented to this Court wherein husbands have been so recreant to the duty which they owe to their wives as to come under the condemnation of the criminal law. The views which I have expressed, I think, give expression to what I conceive to be the best enlightened public sentiment, crystalized into law.

STATE v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 2 December, 1908).

1. **Railroads—Running Trains on Sunday—Indictment—Evidence—Variance—Verdict Directing.**

   When the proof under a bill of indictment, sufficient in form, against a railroad company for running trains, in violation of the statute, tends to fix the offense as occurring in July, and the charge assigned the date as the January following, the time is not material, and the variance is not of the substance, and a prayer of defendant that a verdict of not guilty be thereupon directed should not be granted.

2. **Railroads — Running Trains on Sunday — Bill of Particulars — Discretion of Court, No Abuse of—Error and Appeal.**

   The granting of an order for a bill of particulars to be furnished the defendant railroad company under indictment for running trains on Sunday, in violation of the statute, is in the discretion of the Court, Revisal, sec. 3244; and the question of sufficient compliance is likewise in the sound legal discretion of the trial Judge, and will not be reviewed or disturbed on appeal, unless there has been manifest abuse to defendant's prejudice.

3. **Same.**

   The object of a bill of particulars is to enable the defendant to properly prepare his defense in cases where the bill of indictment, though correct in form and sufficient to apprise the defendant in general terms of the accusation against him, is yet so indefinite in its statements as to the particular charge or occurrence referred to, that it does not afford defendant a fair opportunity to procure his witnesses or prepare his defense. When it appears that the trial Judge has, in his discretion, accepted a bill of particulars as being sufficient under an order theretofore granted at the instance of defendant, and that upon a former trial of the same cause the State's witnesses were examined and information so fully given as to render a further bill of particlars unnecessary, the discretion exercised by the trial Judge will not be reviewed on appeal.

4. **Instructions — Verdict Directing — Language Used—Evidence—Questions for Jury.**

When there is no conflict in the testimony, and, if believed, no inference permissible therefrom but that of guilt, it would not constitute reversible error for a trial Judge to charge the jury: "If they believe the evidence they would render a verdict of guilty"; though better form to charge, "If you find the facts to be as testified," etc.; but when there is conflict in the evidence on any essential feature of the charge, or when, though there is no such conflict, more than one inference of fact is permissible, and any of them consistent with the defendant's innocence, the question of guilt or innocence is one for the jury.

INDICTMENT for running freight trains on Sunday, in violation of the statute, tried before *Lyon, J.*, and a jury, April Term, 1908, of FRANKLIN.

It appeared that, at a former term of the Court, the Judge having ordered a bill of particulars, the same were furnished at April Term, 1907, as follows:

"The State files a bill of particulars herein as follows:

"1st. The train was running north.

"2d. The day on which the same was run was a Sunday between the 1st of May and the latter part of July, the exact date the State is unable to state."

The Solicitor stated that the above bill of particulars was all that he was able to furnish, and the same was accepted by the Court as full compliance with the order of the Court.

After this was done, to-wit, at August Term, 1907, the cause was tried and defendant was convicted and sentenced, and on appeal a new trial was ordered for error in the charge of the Court. The case was reported in 145 N. C., 570. This opinion having been certified down, and cause called for trial at April Term, 1908, defendant moved to quash the bill of indictment, for that the order for bill of particulars had not been complied with. Motion was denied, and defendant excepted.

Defendant further contended that there was a fatal variance between the allegation and the proof, the charge assigning the date to have been 20 January, 1907, and the proof tending to fix the occurrence in July previous, and, on that account, moved to "dismiss the action," and further requested the Court to instruct the jury that, on account of the variance claimed, they would render a verdict of not guilty. This was refused, and defendant excepted. Verdict of guilty, judgment, and defendant excepted and appealed.

Assistant Attorny-General Hayden Clement for State.
Day, Bell & Allen and *T. W. Bickett* for defendant.

HOKE, J., after stating the case: The indictment is sufficient in form, and, time not being material, the variance claimed was not of the substance, and the prayer of the defendant that a verdict of not guilty should be thereupon directed, was properly overruled. *State v. Pickett*, 118 N. C., 1231; *State v. Williams,* 117 N. C., 753; *State v. Jones,* 80 N. C., 415. Nor was there error in denying the motion to quash the bill of indictment for non-compliance with the order requiring a bill of particulars. The bill as rendered was accepted by the Court as sufficient compliance with the order, and the authorities are to the effect, that both the original order and the question of a proper compliance with the same are matters which rest in the discretion of the Court. As to the original order, our statute places the matter in the discretion of the trial Court in express terms. This statute, Revisal, 1905, sec. 3244, which is a very correct embodiment of the general law on the subject of these bills, provides as follows:

"In all indictments when further information not required to be set out therein is desirable for the better defense of the accused, the court, upon motion, may, in its discretion, require the solicitor to furnish a bill of particulars of such matters."

And the decisions hold that the question of sufficient compliance with the order is likewise properly made to rest in the Court's discretion. Abbot's Trial Briefs Criminal Causes, p. 48, citing *State v. Bacon,* 41 Vt., 526; *State v. Hill,* 13 R. I., 314. And, while the Court is inclined to the opinion that the term "discretion," as used and contemplated in the statute, and in these decisions, should be construed to mean the sound legal discretion of the trial Court, it is well understood that the action of the lower Court will not be reviewed or disturbed on appeal, unless there has been manifest abuse in this respect to defendant's prejudice, *State v. Dewey,* 139 N. C., 556, and we are clearly of opinion that, in the present case, no such abuse has been shown. Furthermore, the order of the lower Court should not in any event be disturbed in this instance, for the whole object of a bill of particulars is to enable the defendant to properly prepare his defense in cases where the bill of indictment, though correct in form and sufficient to apprise the defendant, in general terms, of the "accusation" against him, is yet so indefinite in its statements, as to the particular charge or occurrence referred to, that it does not afford defendant a fair opportunity to procure his witnesses or prepare his defense. And, in this case, it appears that there has heretofore been a trial of the cause, when the witnesses were examined and the particular occasion was spoken to in open court, by the State's witnesses; and defendant was, therefore, fully informed, not only of the particular occurrence imputed to him for a crime, but was possessed of the entire case of the prosecution, as developed in the former trial, and a further bill of particulars, which is the usual course when the one offered is insufficient, could have given defendant no further information than he already had. See *State v. Howard,* 129 N. C., 584, in which it was held as follows:

"2. Where, on motion of the defendant, the solicitor is ordered after the evidence is in to elect, thereupon *nol prosses* several counts, which gave as full information as a bill of particulars, the defendant cannot complain of the refusal of the Court to order a bill of particulars."

As there seems to have been some misapprehension as to the true purport of the descision made in the former appeal in this cause, reported in 145 N. C., 570, we deem it not amiss to say that, neither in that case, nor any other, has this Court ever held that, when there was no conflict in the testimony, and if believed, no inference permissible therefrom but that of guilt, it would constitute reversible error for a trial judge to charge the jury, "If they believed the evidence they would render a verdict of guilty." A judge, writing the opinion, has, in several instances, said that it was better form to express the charge, "If you find the facts to be as testified," etc., *State v. Barrett,* 123 N. C., 753; *State v. Hill,* 141 N. C., 769; *State v. Simmons,* 143 N. C., 613, but, under the circumstances indicated, this distinction has never been held reversible error.

The ruling made on the former appeal in this case, and sustained in the forcible opinion of Associate Justice Brown, was, that when there was conflict in the evidence on any essential feature of the charge, or when, though there was no such conflict, more than one inference of fact was permissible, and any one of these consistent with defendant's innocence, the question of his guilt or innocence was for the jury and not for the Court. This is by no means a trivial or technical distinction, but goes to the integrity and very existence of the right of a citizen to a trial by jury. If, on the testimony, there is an inference of defendant's innocence permissible, and a judge is allowed to charge the jury, "If they believe the evidence they will find defendant guilty," this is condemnation by the Judge, and the right of trial by jury, so justly valued as the ultimate protection of freemen under the forms of law, is usurped by the Judge, and the constitutional rights of the defendant are denied him.

"No person shall be convicted of crime, but by the unanimous verdict of a jury of good and lawful men in open court," is the language of our Bill of Rights; and if there is an inference of guilt and one of innocence arising on the evidence, the jury must determine which inference shall be established. As said by *Henderson, J.*, in *Bank v. Pugh*, 8 N. C., 206: "The jury are the constitutional judges, not only of the truth of the testimony, but of the conclusions of fact resulting therefrom." See *State v. R. R., infra.*

In the present trial, the principle declared in the former appeal has been properly applied by the trial Court, and, there being no error in the record, the judgment against defendant is affirmed.

No error.

STATE v. GEORGE HARRIS.

(Filed 2 December, 1908).

Incest—Daughter of Half Sister.

Carnal intercourse of a man with the daughter of his half sister is incest, as defined by Revisal, sec. 3352.

ACTION tried before *Webb, J.*, and a jury, April Term, 1908, of ANSON.

Defendant was indicted for violating the provisions of sec. 3352 of the Revisal, charging that he committed incest, in that he had carnal intercourse with a woman who was the daughter of his half sister. There was evidence tending to prove the act. Defendant requested the court to instruct the jury to return a verdict of not guilty. Denied and defendant excepted. Verdict of guilty. Judgment and appeal.

Assistant Attorney General Clement for the State.

J. A. Lockhart and *McLendon & Thomas* for defendant.

CONNOR, J. The sole question presented by defendant's exception to the refusal of his Honor to direct a verdict of not guilty, is whether the daughter of defendant's half sister comes within the language of the statute. Section 3351 defines incest to be carnal intercourse between grandparent and grandchild, parent and child, brother and sister of the half or whole blood. Section 3352 defines the crime to be such intercourse between uncle and niece, nephew and aunt. For obvious reasons, nothing is said of the half or whole blood. The relation of uncle and niece must of necessity be of the half blood, as in all other relations of consanguinity, other than those defined in the preceding section. As here, the daughter of defendant's sister is of course related to him only by the half blood. The fact that the mother of the girl is only half sister of defendant can not affect the case. To have had such intercourse with her mother—his half sister—would have been incest. The exact question seems to have been decided in *State v. Reedy*, 44 Kan., 190, and *Shelby v. State,* 95 Tenn., 152; *State v. Wyman,* 59 Vt., 527. We think that defendant and his niece, the daughter of the half sister are clearly within the statute. There was no error in his Honor's refusal to give the instruction asked. It must be so certified.

No error.

STATE v. JAMES WHISENANT.

(Filed 9 December, 1908).

1. **Intoxicating Liquors—Unlawful Sale—Procuring for Another.**
Revisal, sec. 3534, making it criminal for one to procure whiskey for another by reason of an unlawful sale, has no application when the sale is not illegal, or when our State legislation on the subject cannot apply to and affect the transaction by reason of the commerce clause in the Federal Constitution.

2. **Same—Agent of Buyer.**
When one acts entirely as agent of the buyer in ordering whiskey to be sent from another State, and has no interest in the whiskey, and has no part in the sale as vendor, or his agent or employee, he is not indictable under Revisal, sec. 3534.

3. **Same—Constitutional Law—Commerce Clause.**
A sale of whiskey consummated in another State, by order of one as agent for the buyer sent from a place in the State where the sale is prohibited, is not indictable under the Commerce Clause of the Federal Constitution, and State legislation cannot affect the transaction, in respect to its criminality, until and after there had been a delivery within the State.

4. **Intoxicating Liquors—Unlawful Sale—Verdict, Interpretation of —Acquittal—Entry of Different Verdict.**
Upon a trial under indictment for selling intoxicating cider and spirituous liquors, there was conflicting evidence as to the former, but the only evidence as to the latter was that defendant ordered one gallon of whiskey from K., beyond the State, for R., at the time he was ordering some for himself, without any interest in the sale as vendor, or vendor's agent or employee, but entirely as agent of the buyer. Without objection, the jury rendered a verdict to the Clerk, "Not guilty as to retailing cider or liquor, but guilty as to ordering one gallon of liquor for R." After the jury was discharged, the Court entered verdict of guilty: "Not guilty of selling liquor, other than the gallon ordered and delivered to R., as testified to by W." *Held*, (1) The sale at K. was not illegal, and not indictable; (2) It was error in the trial Judge to enter a verdict different from the one returned by the jury; (3) By reasonable intendment, the verdict of the jury was one of acquittal, excepting the order sent to K., beyond the State, and defendant should be discharged.

INDICTMENT for unlawfully selling spirituous liquors, etc., and intoxicating cider, to one Jim Ramsey, tried before *Ferguson, J.*, and a jury, August Term, 1908, of BURKE.

Jim Ramsey, for the State, testified that he had bought such liquor, etc. There was dispute and contradictory testimony as to whether the cider sold was intoxicating. On cross-examination the witness denied having gotten defendant to order any whiskey for the witness, and stated that the transactions between them were sales outright. Defendant, a witness in his own behalf, testified that he had never sold Jim Ramsey any intoxicating liquors of any kind; that on one occasion said Ramsey had requested witness to order some whiskey for him with an order witness was sending for himself to a wholesale grocery house in Knoxville, Tenn.; that Ramsey gave witness $1.66, the exact amount of the cost of what he desired to get, and witness wrote the order that night and sent it off the next morning after receiving the money, sending for some at the same time for himself; that witness suffered from asthma and took whiskey for it, under the advice and prescription of a regular physician.

The judge charged the jury, who rendered a verdict to the clerk, which seems to have been without objection. The verdict so rendered, was in form, as follows: "Not guilty as to retailing cider or liquor, but guilty as to ordering one gallon of liquor for Ramsey." The jury having, it seems, been discharged, the Court ordered an entry made as follows:

"The jury for their verdict say they find defendant, James Whisenant, guilty. The jury further say they find defendant not guilty of selling intoxicating cider, and not guilty of selling liquor, other than the gallon ordered and delivered to defendant, Ramsey, as testified to by defendant, James Whisenant."

There was judgment on the verdict, as entered by the Judge, and defendant excepted and appealed.

Assistant Attorney General Clement for State.

J. M. Mull and *J. T. Perkins* for defendant.

HOKE, J., after stating the case: The laws of this State have thus far not made the purchase of whiskey a criminal offense, when it is bought by the purchaser himself and for his own use. The statute which most nearly approaches this is section 3534, of Revisal, which makes it criminal for one to procure whiskey for another by reason of an unlawful sale, and constitutes such a person the agent of the vendor in such an illegal transaction. We have so construed this statute at the present term. *State v. Burchfield.*

To bring one who procures whiskey for another under this statute, it will be noted that the sale by which it was procured must be illegal, and the law does not apply to cases where the sale is not illegal, or where our State legislation on the subject cannot apply to and affect the transaction. Such cases are not within the purview of the section referred to, Revisal, section 3534, but, as to them, the general doctrine obtains, that in a sale of whiskey, where one acts entirely as agent of the buyer, having no interest in the whiskey, and taking no part in sale as vendor, nor as his agent or employee, such person is not indictable under the laws controlling the subject as they now stand. *State v. Smith,* 117 N. C., 809.

Applying the principle announced and sustained in these decisions to the facts presented, we think there was, in effect, a verdict of not guilty rendered by the jury, and, on that finding, the defendant is entitled to be quit of any other or further molestation by reason of the occurrence tried and determined under this indictment against him. There was no testimony offered that would justify or permit a finding that a sale of whiskey consummated in Knoxville, Tenn., was an illegal sale; and if there had been, it would seem that, by reason of the commerce clause of the Federal Constitution, our State legislation on the subject could not affect the transaction, in respect to its criminality, until and after there had been a delivery within the State. *State v. Trotman,* 142 N. C., 662. By fair intendment, and especially when taken in connection with the testimony on the subject, the verdict, as it was rendered by the jury, could only mean that they acquitted the defendant of retailing either liquor or cider, except in so far as the order sent for Ramsey to the house in Knoxville made out a case of guilt. This sale at Knoxville, as we have just said, was not illegal, and there was no evidence touching such order to show that defendant acted otherwise than as the buyer's agent.

The verdict then, as stated, amounted, by fair intendment, to a verdict of not guilty. As said in Clark's Criminal Procedure, page 486: "A verdict is not bad for informality or clerical errors in the language of it, if it is such that it can be clearly seen what is intended. It is to have a reasonable intendment, and is to receive a reasonable construction, and must not be avoided except from necessity."

"This being a correct interpretation of the verdict as rendered by the jury, it was not within the province or power of the court, after they were discharged, to amend or alter their deliverance, in a matter of substance, to defendant's prejudice." Clark, 487.

And our own decisions on both propositions cited from Clark are in substantial accord with the author. *State v. Arrington,* 7 N. C., 571. In this case it was held, among other things, "That wherever a prisoner, either in terms or effect, is acquitted by the jury, the verdict as returned should be recorded." And *Chief Justice Taylor,* in a concurring opinion, speaking to this question, said: "Some of the harsh rules of the common law, in relation to criminal trials, have been gradually softened by the improved spirit of the times; and this, among others, is relaxed in modern practice, where the jury bring in a verdict of acquittal. It is considered as bearing too hard on the prisoner, and is seldom practiced. Hawk., ch. 47, sec. 11, 12. I think this course of proceeding is fit to be imitated here, whenever a prisoner, either in terms or effect, is acquitted by the jury, and that in all such cases the verdict should be recorded; although I am persuaded that they were desired to reconsider their verdict in this case, with the purest intention, and solely with a view that they might correct the mistake they had committed. The verdict first returned ought to have been recorded; and it ought to be done now, *valeat quantum valere potest.* The effect will be the same as if a verdict of acquittal were recorded; but I think it most regular to put upon the record what the jury have found."

There was error in respect to matters as indicated, and this will be certified to the end that the verdict as rendered by the jury be recorded, and the defendant be discharged.

Reversed.

STATE v. LUTHER BANNER.

(Filed 9 December, 1908).

1. **Jurors—Motion to Quash—Challenge to Array—Plea Entered.**
   A motion to quash on the ground that the jury list had not been revised, and a challenge to the array for the same reason, is made too late, in a criminal action, after entry of plea of not guilty.

2. **Jurors—Revision of Jury List—Statutes Directory.**
   Revisal, secs. 1957-1960 (Code, secs. 1722-1728), relative to the revision of the jury list, are directory only, and while they should be observed, the failure to do so does not vitiate the venire, in the absence of bad faith or corruption on the part of the county commissioners.

3. **Jurors—Qualification—Motion to Quash—Payment of Taxes—Cause Pending—Plea—Discretion of Court.**
   Under the provisions of ch. 36, Laws 1907, an indictment may not be quashed or judgment arrested at any time, because one of the grand jurors had not paid his taxes or had a cause pending and at issue. Formerly, it was discretionary with the trial Judge to allow or refuse such motion after entry of plea until the petit jury was sworn and empaneled, and a motion to quash after entry of plea was made too late as a matter of right.

4. **Jurors—Opinion Formed and Expressed—Trial Judge—Discretion.**

The finding of the trial Judge that a juror is a fair one, though he has formed and expressed an opinion, is a matter in the discretion of the trial Judge, and not reviewable on appeal.

5. **Jurors—Criminal Action—Right to Reject—Peremptory Challenge Not Exhausted.**

The right of the prisoner is to object to, and not to select, jurors, and when the jury has been completed before he exhausts his peremptory challenge, he cannot be heard to complain.

6. **Murder — Defense — Insanity — Evidence — Opinion—Non-Expert Witnesses—Mental Capacity.**

When the defense of insanity is pleaded by the prisoner on trial under indictment for murder, it is competent for non-expert witnesses to testify, from their own personal experience and contact with the prisoner for a period immediately preceding the act of killing, stating the facts and circumstances from which they derive their opinion, that the prisoner knew, and on the day in question knew, it was wrong to kill the deceased in the manner testified to, or established.

7. **Murder—Defense—Insanity—Evidence.**

When the defense is a plea of insanity and not self-defense, a witness may not testify, as tending to show self-defense, that he had seen deceased armed, on a dark night, at a place where the prisoner would likely pass, some two weeks before the occurrence, though he may testify that he had told the prisoner concerning it, and what the prisoner said and did in consequence, only so far as it may affect the question of insanity, and for that purpose alone.

8. **Murder—Defense—Insanity—Evidence — Character of Deceased.**

Under the plea of insanity as a defense, upon a trial under an indictment for murder, it is not competent to show the violent or dangerous character of the deceased.

9. **Remarks of Counsel—Misstatements of Law—Power of Court—Correction.**

It is improper for counsel for defense to argue to the jury matters relevant only to the legal effect of a judgment upon their verdict of insanity, should the jury so find; and it is proper for the Court to correct therein any misstatements of the law calculated to mislead the jury, and instruct them to return a verdict of guilty or not guilty as they may find the fact to be upon the evidence.

INDICTMENT for murder tried before *Justice, J.*, and a jury, March Term, 1908, of WATAUGA. Defendant appealed.

Assistant Attorney-General Hayden Clement for the State.

L. D. Lowe, M. N. Harshaw, R. Z. Linney and *Mark Squires* for defendant.

CLARK, C. J. The deceased and a companion, named Richards, were walking down the street on the opposite side from the store owned and operated by the prisoner. The prisoner, standing in his store door, called Richards to him. The deceased kept on down the street, and as soon as Richards got near prisoner, the latter stepped into his store, got his double barreled breech loading gun, and fired at the deceased who had then gotten some twenty steps beyond the store, still on the opposite side of the street. The deceased was looking to the front. The deceased fell and died instantly. The prisoner relied solely upon the plea of insanity.

The prisoner after his arraignment and entry of plea of "not guilty," moved to quash the bill because the jury list had been last revised in 1905, and also challenged the array on the same ground. The motion to quash and the challenge to the array came too late, after entry of plea of "not guilty." *State v. Gardner,* 104 N. C., 740. Besides "the regulations contained in secs. 1722-1728 of the Code (now Rev., secs. 1957-1960) relative to the revision of the jury list, are directory only, and while they should be observed, the failure to do so does not vitiate the venire, in the absence of bad faith or corruption on the part of the county commissioners," *State v. Dixon,* 131 N. C., 810; *State v. Perry,* 122 N. C., 1021; *State v. Daniels,* 134 N. C., 641. "The statute is considered directory merely so far as it relates to the action of the commissioners as to the time and place of drawing the jury and as to the revising the jury list." *State v. Teachey,* 138 N. C., 591; *State v. Hensley,* 94 N. C., 1027.

The prisoner moved to quash the bill because a member of the grand jury which found the bill had, at the time, a civil case pending and at issue. The Court found such to be the fact but refused to quash, the motion being made after entry of plea of not guilty.

In *State v. Gardner,* 104 N. C., 742, this Court, in commenting upon sec. 1741 of the Code, which has been brought forward verbatim, Revisal, sec. 1970 said: "We are of the opinion, therefore, that, according to the true import of the statute, the prisoner had the right to make the motion to quash up to the time when he was arraigned and entered his plea, and after the plea was entered it was within the discretion of the Judge below to allow or refuse the motion till the jury were sworn and impanelled to try the case. This strict construction gives effect to all the provisions of the statute, but does not abrogate the established common law practice not repugnant to them." Besides, the statute, ch. 36, Laws 1907, now provides, "No indictment shall be quashed, nor shall judgment thereon be arrested, by reason of the fact that any member of the grand jury finding such bills of indictment had not paid his taxes for the preceding year or was a party to any suit pending and at issue." This statute excludes such motion at any time.

The defendant excepted because J. S. Lewis, a juror who was drawn and tendered to prisoner, was challenged for cause to the favor, and on his examination said he had formed and expressed the opinion that the prisoner was guilty and that it would take evidence to remove that impression. He also said, on cross-examination, that he could go into the jury box and hear the evidence and charge of the Court and render a verdict as though he had never heard of the case. "The Court finds that the juror is a fair juror," and the prisoner excepted. The ruling was correct. *State v. Kilgore,* 93 N. C., 533; *State v. Green,* 95 N. C., 611; *State v. DeGraff,* 113 N. C., 688. Besides, the finding that the juror is indifferent is a matter in the discretion of the trial Judge, and not reversible in this Court. *State v. Register,* 133 N. C., 751; *State v. DeGraff,* 133 N. C., 688; *State v. Potts,* 100 N. C., 459; *State v. Green,* 95 N. C., 611; *State v. Collins,* 70 N. C., 241.

Further, the jury was completed before the prisoner exhausted his peremptory challenges. No one sat on the jury to whom he objected. The prisoner's right is to *object* to, not to *select,* jurors. *State v. Gooch,* 94 N. C., 1007; *State v. Hensley, ib.,* 1028.

There were several other exceptions to jurors to the same effect, but, besides being invalid for above reasons, they were abandoned by not being relied on in the prisoner's brief. Rule 32.

One Cook, clerk in the prisoner's store, testified that when the prisoner left, five minutes after the shooting, he told witness to "take care of his business." He further testified, on cross-examination by prisoner's counsel, that the prisoner was considered an exceptionally good trader and shrewd merchant, and he had not noticed much difference in the last three or four months before the killing. He further said, on re-examination, that he had been in prisoner's store for nearly two years at that date, and prisoner's mental condition was about the same as when he first went into the store, and that during those two years he could not discover any change at all in prisoner's mental condition. Prisoner excepted. The witness further said, in reply to queries, that at any time in those two years the prisoner knew that it was wrong to shoot a man down, unless he was so drunk he would not know a man when he saw him. The cross-examination had endeavored to show by witness that the prisoner was insane, and these questions were legitimate to show that the prisoner was attending to business and knew that it was wrong to shoot any one down. In *State v. Haywood,* 61 N. C., 376, the Court approved the charge, when the defence of insanity was set up, "if the prisoner was conscious of doing wrong at the time he committed the homicide, he is responsible." The prisoner's counsel, on cross-examination of this witness, the prisoner's clerk, who had been in the store with him daily for nearly two years, endeavored to show that prisoner's mental condition had much deteriorated in the last four or five months, and it was competent on re-examination to contradict that supposition and to elicit the witness' opinion (*Clary v. Clary*, 24 N. C., 78) that during those two years, when the witness had the fullest opportunity of close observation of the prisoner, he at all times was sane enough to know that it was wrong to shoot a man down. Any one, though not an expert, who has opportunity of observation of a person is competent to express his opinion of that person's sanity or insanity, *Clary v. Clary, supra.*

In *State v. Khoury, ante,* 454, it is said, "The Court permitted witnesses who had seen defendant, and had more or less opportunity to form an opinion as to his mental condition, to express said opinion. This is in accordance with repeated rulings of this Court, and may now be regarded as settled law. The value of the opinion is dependent upon the opportunity of the witnesses to form it. *Clary v. Clary,* 24 N. C., 78; *State v. Bowman*, 78 N. C., 509."

Dr. Hodges, who had been the prisoner's physician, after testifying that the prisoner had been postmaster, revenue officer and member of Legislature, stated on cross-examination, without objection, that he had never seen the prisoner sober when he, witness, did not think the prisoner had intelligence sufficient to know right from wrong, that he had seen prisoner irritable when he would not consider right from wrong, but the witness thought he knew right from wrong. The witness further stated that the last time he saw prisoner sober, "in his opinion, the prisoner had sense enough to know it was wrong to take out his shotgun and shoot a man in the back of the head, that he walked into prisoner's store just before the homicide and shook hands with him, noticed nothing peculiar about him, thinks the prisoner would have known it was wrong that day to shoot a man." This evidence was brought out on cross examination of the prisoner's witness, and the opinions expressed were competent upon the authorities above cited.

The prisoner offered to show by the evidence of one E. J. Banner that, within two weeks of the homicide, the witness saw the deceased at a log across the creek on the highway, with a gun on his arm, about dark, and that he communicated this at once to the prisoner, and, then, to show what the prisoner said and did upon receiving said information. The Court would not allow the witness to testify as to what he saw of deceased, but the witness was allowed to state what he told the prisoner for the purpose only of tending to prove the prisoner's insanity, and the witness was permitted to state what the prisoner said and did at the time he received the information from the witness. Inasmuch as the defendant did not rely upon the plea of self defense, and as there was no element of self defence in the case, the Court properly excluded the actions of the deceased before the homicide from the consideration of the jury, but allowed the witness to testify as to the effect the communication of said actions had upon the prisoner. This was as far as the Court could go, and the exception is without merit.

In *State v. Worley,* 141 N. C., 766, the Court holds that evidence was clearly inadmissible which tended to show the declaration of the deceased in relation to a prior difficulty with prisoner, the Court saying: "It contained no threat and was a narrative of past transactions." This exception is even weaker than that, inasmuch as it does not even show a prior difficulty, but only that deceased was armed and was on the road or pathway where prisoner was accustomed to travel.

The prisoner offered to prove the character of the deceased as a dangerous, violent man. This was properly excluded. *State v. Exum,* 138 N. C., 607. The exceptions to the rule that the character of the deceased cannot be put in evidence are: 1. When there is evidence tending to prove that the homicide was committed in self defence. 2. When the evidence is wholly circumstantial, and the character of the transaction is in doubt. *State v. Turpin,* 77 N. C., 473; *State v. Byrd,* 121 N. C., 688; *State v. McIver,* 125 N. C., 646.

During the argument, the counsel for the prisoner, in their argument to the jury, told the jury "the only defence upon which they relied for acquittal was insanity, and that if the jury acquitted the prisoner he would not be turned loose, but it was the duty of the Judge to commit him to the asylum for the criminally insane, where he would have to remain until he was relieved by an act of the Legislature, which would never be done, and the prisoner would be confined in an insane asylum for the remainder of his life."

At the close of the charge of the Court, to which there was no exception, the Court added the following: "Your attention has been called to the statute which provides that a prisoner acquitted upon the defense of insanity may be by the Judge committed to the asylum for the criminally insane and kept there until he is discharged by an act of the Legislature. And it has been argued to you that, in case the prisoner was acquitted, the Judge would have the right to send him to the asylum for the criminally insane. That act of the Legislature has been passed upon by the Supreme Court of North Carolina and declared to be unconstitutional, and if the prisoner is acquitted because of insanity at the time he committed the offense the Court has no power to send him to an asylum, but he must be discharged. I have called your attention to this, not for the purpose of influencing your verdict one way or the other, but to correct the impression which may have been made upon your minds from the argument of counsel. It is your duty to base your verdict upon the evidence before you." The prisoner excepted.

This exception cannot be sustained. The argumnt of counsel was improper. The jury should not consider the sentence the Court may impose. It is the province of the jury to pass upon the facts and return a verdict of guilty or not guilty as they may find the fact to be. There the responsibility of the jury ends. The remarks of the Court were proper in order to correct the effect of the improper remarks of counsel.

The jury returned a verdict of guilty of murder in the second degree. The prisoner has no cause to complain of his trial, but good ground to congratulate himself on the result, for the evidence would have justified finding him guilty of murder in the first degree. There was no evidence that would have justified a jury in sustaining the plea of insanity, but upon the uncontroverted facts as to the homicide, there was no other possible plea to which the prisoner's counsel could resort.

No error.

STATE v. GROVER WALKER and LONE WALKER.

(Filed 9 December, 1908).

1. **Evidence—Weight—Scintilla—Questions for Jury.**
   When there is more than a scintilla of evidence as to the identity of a defendant, it is for the jury to pass upon its weight.

2. **Secret Assault—Circumstantial Evidence—Sufficient.**
   Upon trial under indictment for secret assault against two defendants, judgment was rendered against both, one of them appealed. There was evidence tending to show that assault was made upon witness and two sons, and that one of the defendants, appellant's brother, was one of them; that a pistol ball, 38 calibre, was taken thereafter from witness's arm, and that a large number of No. 12 shotgun shells, and four or five No. 38 empty pistol shells, were found in the yard where the assault was made; that appellant had that evening bought several boxes of shotgun shells, No. 12, and was seen with the other defendant, who was armed with a 38-calibre pistol, about three hours before the occurrence, within time for them to have been present; that one of the occupants of the room had previously reported a blockade still of the appellant's brother, who was admitted to have been present. *Held*, the evidence, taken collectively, was sufficient to sustain the finding of the jury.

INDICTMENT against defendants for secret assault, tried before *Ferguson, J.*, and a jury, March Term, 1908, of WILKES.

Jesse Fairchild, a witness for the State, testifying to the occurrence, said: "On the night of 13 November, 1907, between 11 and 12 o'clock, I was waked up by the roar of guns; shots were being rapidly fired into the house. There were some forty or fifty shots fired. They were shooting through the window toward the bed occupied by W. A. Fairchild. The room was occupied by W. A. Fairchild, Mrs. Fairchild, Mrs. Walker, grandmother of the defendant, and Jesse Fairchild.

"I got up, crawled to the bureau in the room; just as I put my hand in the drawer to get some shells to load my gun I was shot through the arm by a pistol ball. (Witness produced the ball No. 38.) While the shooting was going on Mrs. Walker says 'Grover, get away from here.' The firing up to that time had been through the window toward the bed occupied by W. A. Fairchild, the shots taking effect in the foot and head of the bed. After Mrs. Walker spoke to them they began firing toward the bed occupied by Mrs. Walker. The shots were all fired very rapidly and too fast, in my opinion, to have been fired by one person. The firing continued for something like 15 minutes. The pistol was fired 4 or 5 times. The gun fired about 50 times; shots taking effect in the house and the windows. I saw some one walk up to the window whom I took to be Grover Walker. I raised my gun to fire; he saw me and raised his. I fired just a little first, then his gun fired; he dropped his head and walked around the chimney. Another shot was fired from the outside, then the firing ceased. I do not know whether that shot hit the house or not; I did not hear it hit. Next morning I went out; I traced blood from the window around the chimney to a pile of rock. There I found that the man had fallen over the rock pile. From the rock pile I traced blood to a pile of sticks; there was blood on the sticks and every evidence that indicated that he had fallen there. I traced blood on to a thorn bush; evidence that he had run into the bush. From the bush I traced him to the fence, where the path crosses leading to the home of Jim Walker, father of the defendant. I saw no traces of blood beyond the fence."

W. A. Fairchild, for the State, gave substantially the same account; stating, further, that about a month before the occurrence, in hunting the woods for bees, he had found defendant, Grover Walker, working in a blockade distillery, and reported it; and three or four days before, said defendant passed witness's home, cursed witness and said he would kill him. He further testified, that some forty or fifty shots were fired in rapid succession from a shot gun and pistol, and too close together to have been fired by one person; and further, that next morning they found in the yard two piles of empty shotgun shells No. 12, about two feet apart, and also four or five empty pistol shells near the same place.

Jimmie Poach, for the State, testified: "On the night of the 13th of November I was at the house of Jim Walker. Jim Walker came into the room where I was sleeping, waked me up, told me that Grover Walker was very badly shot, between 12 and 1 o'clock. I went into the room, found Grover there with one eye shot out, several shots in his face and in his shoulder."

John Palier testified: "I am a merchant living in Caldwell County. On the evening of 13th November, Lone Walker came to my store and bought 4 boxes of shotgun shells; two No. 12 and two No. 16. He asked me to go down to his home. He lived about ¼ of a mile from my store and about six or seven miles from W. A. Fairchild. I went down to his home, found Grover Walker there, saw Grover have pistol No. 38. I left them both there together between 8 and 9 o'clock. Lone Walker, a short time before this, had been suffering with a carbuncle on his neck and had had a doctor with him."

The doctor testified, that on the following day he was called in to see defendant, Grover Walker, and found one eye shot out. It further appeared that defendants were brothers.

Grover Walker did not resist verdict. The defendant, Lone Walker, requested the Court to charge that there was not sufficient evidence to warrant a verdict against him. Declined, and defendant, Lone Walker, excepted. Verdict of guilty against both defendants. Judgment, and defendant Lone Walker excepted and appealed.

Assistant Attorney General Hayden Clement for the State.
Finley & Hendren and *J. A. Holbrook* for defendant.

HOKE, J. The controlling principle on a question of this character is very well stated by *Merrimon, J.,* in *State v. White,* 89 N. C., 464-465, as follows:

"It is well settled law, that the Court must decide what is evidence, and whether there is any evidence to be submitted to the jury, pertinent to an issue submitted to them. It is as well settled, that if there is evidence to be submitted, the jury must determine its weight and effect. This, however, does not imply that the Court must submit a scintilla—very slight evidence; on the contrary, it must be such as, in the judgment of the Court, would reasonably warrant the jury finding a verdict upon the issue submitted, affirmatively or negatively, accordingly as they might view it in one light or another, and give it more or less weight, or none at all. In a case like the present one, the evidence ought to be such as if the whole were taken together and substantially as true, the jury might reasonably find the defendant guilty.

"A single isolated fact or circumstance might be no evidence, not even a scintilla; two, three or more, taken together, might not make evidence in the eye of the law, but a multitude of slight facts and circumstances, taken together as true, might become (make) evidence that would warrant a jury in finding a verdict of guilty in cases of the most serious moment. The Court will be the judge as to when such a combination of facts and circumstances reveal the dignity of evidence, and it must judge of the pertinency and relevancy of the facts and circumstances going to make up such evidence. The Court cannot, however, decide that they are true or false; this is for the jury; but it must decide that, all together, they make *some evidence* to be submitted to the jury; and they must be such, in a case like the present, as would, if the jury believed the same, reasonably warrant them in finding a verdict of guilty."

Substantially the same statement has been announced and upheld in other decisions of this Court. *State v. Carmon,* 145 N. C., 481; *State v. Costner,* 127 N. C., 566; *State v. Lytle,* 117 N. C., 799; *State v. Christmas,* 101 N. C., 749, and its correct application requires that, on the facts presented here, the verdict and judgment should be sustained. While the testimony tending to inculpate Lone Walker, the appellant, is not very extended, when considered in connection with the facts which were admitted or established on the trial, it has much more significance than would appear on a cursory examination. It was established that the home was shot up by at least two persons, and that Grover Walker was one of them; that it was done by a pistol and gun, the pistol being a 38 calibre, that was the size of the bullet taken out of Jesse Fairchild's arm, and the gun, a shotgun No. 12; forty or fifty shots were fired, and in the morning a large number of empty shotgun shells, size No. 12, and four or five empty pistol cartridges, calibre 38, were found in the yard. On the evening of the occurrence, at a store in Caldwell County, six or seven miles from the house, Lone Walker, the appellant and brother of Grover, bought four boxes of shotgun shells, two No. 12 and two No. 16, and the merchant who sold them, on going home with Lone, one-fourth mile distant, found his brother, Grover, there armed with a 38-calibre pistol, and testified that he left them there together at 8 or 9 o'clock P. M., this giving them ample time to have gone to the house of Fairchild at the time indicated, 11 or 12 o'clock. No one duly considering this testimony would entertain a reasonable doubt, certainly it is an inference fairly deducible, that the shells bought at the store by Lone Walker were the shells used in firing the house, and, if they were, who used them? Defendant was the brother of Grover, whose blockade still had been reported by W. A. Fairchild, the occupant of the house. He was with his brother on the night of the occurrence within six or seven miles of the house, and with ample time to have been present. It was admitted that Grover was present. His brother Grover had a companion assisting him. Defendant that very evening bought the shells that were used, or there is evidence sufficient, certainly, to justify that conclusion. The empty shells on the ground proved to be shotgun shells No. 12, the same size as two of the boxes that Lone Walker had procured and purchased a few hours of the occurrence, and the pistol used was a No. 38, the same calibre as the pistol that Grover Walker was shown to have had when he was at Lone Walker's home.

Under the decisions referred to, and others of like import, these facts, we think, rise to the dignity of evidence, justifying the conclusion that Lone Walker was the person who assisted his brother on the occasion in question, and upholding the ruling of the Court in submitting the question of his guilt or innocence to the jury. The testimony tending to support the position is stronger than in many of the cases where a verdict of guilty has been upheld.

There is no error, and the judgment below will be affirmed.

No error.

STATE v. RUBE PETERSON.

(Filed 9 December, 1908).

1. **Jurors, Right of Accused to Reject—Appeal and Error.**

   The right of an accused, in a criminal action, is to reject, and not to select the jurors, and the act of a trial Judge in standing a juror aside is not reviewable on appeal, though he should give an erroneous legal reason therefor.

2. **Appeal and Error — Witnesses, Improperly Sworn — Exception, When Taken.**

   An exception that witnesses were not properly sworn, when no objection was made at the time, and none entered to their examination, cannot be entertained on appeal.

3. **Murder—Evidence—Opinion Evidence—Marks of Shooting.**

   Upon a trial for murder by shooting, it is competent for a witness to testify, from his own observation of facts, that there was other evidence of shooting besides the wound on the dead body, as, for instance, bullet holes, bullet marks on surrounding objects, and fresh and empty shells.

4. **Murder—Admissions, Effect of—Malice—Burden of Proof.**

   Upon a trial for murder in the second degree, testimony by a State's witness of declarations of defendant subsequent to the killing that he had to kill deceased, the killing with a deadly weapon being admitted, is but an admission of the homicide alone, raising, in law, the presumption of malice, and puts the burden of showing self-defense or manslaughter upon the prisoner.

5. **Murder—Admissions, Effect of—Instructions Ambiguous.**

   Upon a trial for murder there was testimony that "the witness said to the prisoner: 'I saw the body. I guess you had to kill him (the deceased),'" to which the prisoner answered, "Yes." The defendant requested the Court to instruct the jury that there was insufficient testimony to go to the jury, leaving out this conversation, to connect the prisoner with the homicide; and that "if the answer of the prisoner, consisting of one word only, satisfies you beyond a reasonable doubt that the prisoner killed the deceased, and the same answer raises a reasonable doubt in your minds whether the killing was of necessity and without fault on his part, then you will acquit the prisoner." *Held*, the instruction was too ambiguous, if for no other reason, to lay the foundation of self-defense.

6. Instructions—Remarks of Counsel—Harmless Error.

Remarks made to the jury by the solicitor in a trial for murder, that it had been a long time since a crime of that nature had been committed, because the juries of the county had put a stop to crime by punishing it, is not reversible error, especially when the Judge cured it by charging, that they must find their verdict from the evidence and must not be influenced by such remarks.

INDICTMENT for murder tried before *Ferguson, J.,* and a jury, Fall Term, 1908, of YANCEY. Defendant appealed.

Assistant Attorney-General Clement for the State.

J. Bis Ray, Gardner & Gardner and *Adams & Adams* for defendant.

CLARK, C. J. The solicitor entered a *nol pros* as to murder in the first degree. The jury convicted the prisoner of murder in the second degree.

The State challenged for cause a juror who was bound over to that term for an affray. The Court stood the juror aside as incompetent. Whether the reason the Court gave was correct or not his finding is not reviewable. *State v. Green,* 95 N. C., 613. The prisoner cannot except to the Court excusing a juror. *State v. Barber,* 113 N. C., 712. The prisoner's right is to reject, not to select. *State v. McDowell,* 123 N. C., 764; *State v. Gooch,* 94 N. C., 987; *State v. Hensley, ibid,* 1021; *State v. Jones,* 97 N. C., 469.

The exception that certain witnesses were not properly sworn cannot be considered, because the prisoner made no objection at the time or to the examination. *State v. Council,* 129 N. C., 517, and cases cited. Had the prisoner objected in apt time the Judge could, and doubtless would, have cured the purely technical objection raised. In *State v. Gee,* 92 N. C., 756, where the witness was not sworn at all, the Court held that objection could not be taken after verdict.

The third exception is to the question to a witness, "Did you see any evidence of shooting other than the wound on the dead man?" The witness replied, "Yes," and gave as instances bullet holes, marks of bullets on the house, on bushes, fresh and empty cartridge shells. This was not objectionable as opinion evidence, but was testimony from observation of facts, and competent. *Britt v. R. R.,* 148 N. C., 37. The fourth exception was to the same testimony by another witness.

A witness for the State testified that he said to the prisoner, "I guess you had him to kill! Prisoner said 'Yes.' That was all that was said." The prisoner did not go on the stand, nor introduce any evidence tending to show killing in self-defense. Nor was there such evidence from the State. The above admission was competent against the prisoner to prove homicide. But his declaration was not evidence in his own favor to show self-defense, especially when ambiguous, as this was. It was proper to exclude evidence attacking the character of the dead man unless there was evidence of self-defense, not merely an admission by prisoner in his own favor. *State v. Turpin,* 77 N. C., 473. The defendant introduced no evidence. The only evidence tending to connect the defendant with the difficulty, as admitted by counsel in his prayer for instruction, was the defendant's affirmative answer to the question, "I guess you had him to kill." This question and answer is not evidence for the prisoner, but against him. The answer, "Yes," admitted the homicide, and threw the burden of proving self-defense or manslaughter on the prisoner.

"What a party says exculpatory of himself after the offense was committed, and not part of the *res gestae,* is not evidence for him; otherwise he might make evidence for himself." *State v. Stubbs,* 108 N. C., 775; *State v. Moore,* 104 N. C., 744; *State v. Ward,* 103 N. C., 419; *State v. McNair,* 93 N. C., 628.

So there was no evidence on the part of the defendant tending to mitigate the crime from murder in the second degree.

The killing with a deadly weapon being admitted, as it was in this case, the law presumes malice. The burden of proof was upon the prisoner to reduce the crime or to show self-defense. This he did not try to do.

The prisoner asked the Court to instruct the jury as follows: "There is not sufficient evidence to go to the jury connecting the prisoner with the homicide, leaving out the following conversation between the defendant and the witness Thos. McKinney. The witness said to the prisoner: 'I saw the body. I guess you had him to kill,' to which the prisoner answered, 'Yes.' Now, if the answer of the prisoner, consisting of one word only, satisfies you beyond a reasonable doubt that the prisoner killed the deceased, and the same answer raises a reasonable doubt in your minds whether he killed of necessity and without fault on his part, then you will acquit the prisoner." The request was given down to and including the word "Yes"; what followed was refused by the Court, and the defendant excepted. It was too ambiguous, if for no other reason, to lay the foundation for self-defense.

Lastly, the prisoner excepted because counsel for the State, in his address to the jury, said, "It has been a long time since such a crime as this has happened in Yancey County, because you have punished crime and put a stop to it." Counsel for prisoner objected that there was no evidence of this. The jury knew, as a matter of common knowledge, and as well as any witness could have told them, whether crime in the county was decreasing, and they must have understood that counsel was not testifying, but merely expressing his opinion of the cause of the alleged decrease. A Court could not hold such a remark as reversible error. If it could have made any serious and damaging impression upon the jury, his Honor cured it in his charge, by referring to this and telling the jury, they "must not be influenced in their verdict by what had not been done, but that they must find their verdict from the evidence before them, under the rules of law laid down by the Court, without regard to results." *Jenkins v. N. C. Ore Co.*, 65 N. C., 563; *State v. Tuten*, 131 N. C., 701; *State v. Tyson*, 133 N. C., 692.

No error.

STATE v. ISAAC BURCHFIELD.

(Filed 9 December, 1908).

1. **Intoxicating Liquors—Procuring Sale—Construction of Statute—Agency—Principal.**

   Revisal, sec. 3534, making it unlawful for any one to procure for and deliver spirituous liquors to another, and making such person, in law, the agent of the seller, and punishable, though its meaning is not plain, makes the one procuring liquor by purchase from an illicit dealer, in prohibited territory, and delivering it to another, the agent of the seller, and subjects him to the punishment prescribed therein, as a principal in the misdemeanor.

2. **Same—Evidence—Incompetent.**

   If one buys whiskey for another from an illicit dealer in prohibited territory, without being interested in the sale otherwise than as agent of the purchaser, to whom he delivers it, and pays the money to the seller for the buyer, it is a wrongful procuring of the whiskey of another within the meaning of Revisal, sec. 3534; and his testimony, that he was acting solely as agent for the buyer, cannot change the character of the act from that intended by the statute.

INDICTMENT for unlawful sale of spirituous, etc., liquors, tried before *Councill, J.*, and a jury, July Special Term, 1908, of MITCHELL.

The defendant was indicted for retailing liquor. Gus Tolley, a witness for the State, testified: "George Tolley, the defendant, and myself were at the depot in Cranberry, N. C., and we wanted some whiskey. Defendant said that Bill Triplett had some and we could get some from him, thereupon we agreed to make up (the amount) and get some. I put in 75 cents, George put in 75 cents and defendant $1.50, and defendant took the money and went after liquor. In a short time he came back with a gallon of whiskey in a jug, and said he got it from Bill Triplett. We then divided the whiskey. I took the jug and filled two quart bottles and gave them to the defendant and George Tolley, and I kept the half gallon of liquor in the jug."

The defendant, in his own behalf, testified: "Gus Tolley, George Tolley and myself were at the depot in Cranberry, N. C. We all wanted some liquor. I told them we could get some from Bill Triplett, who was an illicit dealer in liquor, and we agreed to make up (the amount) and buy a gallon. I wanted a half gallon, and put in $1.50; they wanted a quart each and put in 75 cents each. I took the money and went to where Bill Triplett was, about 100 yards away, and paid him $3.00 and got a gallon of liquor from him, and took it back to the depot where Gus and George Tolley were waiting for me. After we all took a drink, Gus and George Tolley poured out a half gallon of the liquor into two quart bottles for me, and they took the other half gallon in the jug. I had no interest whatever in Bill Triplett's liquor, and was not trying to sell it for him, and was in no way acting as agent for him."

The Court instructed the jury, that if they found the facts to be as stated by the defendant in his testimony, they should return a verdict of guilty. The jury convicted the defendant and, judgment having been rendered upon the verdict, he appealed to this Court.

Assistant Attorney-General Hayden Clement for the State.
S. J. Ervin and *M. N. Harshaw* for defendant.

WALKER, J. It may be conceded, for the sake of argument, that there is no evidence in this case that the defendant sold any liquor, with or without a license, unless in buying the whiskey from William Triplett, the illicit dealer, for Gus and George Tolley, he acted as his agent, or more properly speaking, aided and abetted the illicit dealer in the sale of the whiskey. In the case of *State v. Smith,* 117 N. C., 809, it was said that "this Court has never held and does not now give its sanction to the doctrine that the purchaser from an illicit vendor, even when he knows him to be such, is *particeps criminis,* and it necessarily follows that the agent through whom he buys is in no worse plight. But it was incumbent on the defendant, in order to excuse himself on that ground, to satisfy the jury that he did actually buy from another in the capacity of agent for the prosecuting witness, and not as an agent or employee of a person who furnished the liquor, or as the agent both of such person and the prosecuting witness." While it is true that a person who buys for himself, even from an illicit dealer, may not be criminally liable, because he cannot be considered, in a legal sense, as assisting the dealer in making a sale by merely buying from him, yet, under the present law, he does aid him in making a sale to another if he procures the money which is to be paid to the dealer, as the price for the liquor, and then pays it to him, receives the liquor and delivers it to the purchaser. The law had prohibited the sale of liquor at the place where this liquor was sold by Triplett and delivered to the Tolleys. Acts of 1903, ch. 349. It is provided by the Revisal, sec. 3534, as follows: "If any person shall unlawfully procure and deliver any spirituous or malt liquors to another, he shall be deemed and held in law to be the agent of the person selling said spirituous and malt liquors, and shall be guilty of a misdemeanor and punished in the discretion of the Court." The meaning of that section is not very aptly expressed, but the Legislature has sufficiently declared the intention to make it criminal for any person to procure liquor from an illicit dealer by purchase and to deliver it to another, when both the purchase and the delivery are made in a place where the sale of liquor is prohibited by law. In such a case, the person who buys the liquor and delivers it to another is deemed, in law, to be the agent, not of the purchaser, but of the seller. While the indictment is drawn for retailing, it charges in terms that the defendant unlawfully and wilfully sold a quantity of liquor to Gus Tolley. If he procured the liquor from Triplett and paid him the price therefor, which he had received from the Tolleys, and then delivered the liquor to them, he was, by sec. 3534 of the Revisal, thereby constituted an agent of Triplett, and, while the sale was made by Triplett through him as agent to the Tolleys, he aided and abetted the sale within the meaning of that section and became a principal in the commission of the criminal act. Although the language of the section is that the person procuring and delivering the liquor shall be deemed, in law, the agent of the seller, it clearly means that such person shall be considered as a principal and liable criminally as the seller. In misdemeanors, all who participate in the commission of the offence are regarded as principals. *State v. Smith,* 117 N. C., 809. In Bishop on Stat. Crimes (2 Ed.), sec. 1024, it is stated that he who sells liquor as the agent or servant of the owner, is liable for the whole offence as seller, and it makes no difference that others are equally liable also for the same sale, provided, of course, that the sale by the owner is unlawful and a misdemeanor. It is suggested that, unless it is forbidden by statute (Revisal, sec. 3534), where several persons contribute to a fund, with which they lawfully buy liquor, and then divide it among themselves in proportion to their contribution to the common fund, none of them thereby sells any of the liquor to the others, and that it has been so decided in other States. *Miller v. Com.,* 76 S. W., 515; *Miller v. Com., ibid,* 509. We need not consider this question, as it is not presented in this case. See *State v. Neis,* 108 N. C., 787. The statute to which we have referred was intended to prevent the purchase by one person of liquor from an illicit dealer, and its delivery to another who has paid the price, by declaring the person who acts as the intermediary the agent of the seller, in the sense that he is an aider and abettor in the unlawful sale and a principal offender.

It is not necessary that we should discuss the question whether, independent of the statute (Revisal, sec. 3534), a person who buys liquor from one he knows to be an illicit dealer and delivers it to another, who has given him the money to make the purchase, is criminally liable for his act as an aider and abettor of the guilty seller, whether he be his agent or the agent of the purchaser. As to this point, the authorities seem to be somewhat in conflict. In *Foster v. State,* 45 Ark., 361, he was held liable, though he was the agent of the purchaser, as he also aided and procured the illegal sale and, therefore, was a principal. We need not assent to or dissent from that conclusion, as the decision of this case depends upon the true construction of a local statute.

In the view we take of the case, it is unnecessary to consider the authorities cited by the defendant's counsel. *State v. Hopkins,* 49 N. C., 305; *State v. Taylor,* 89 N. C., 577; *State v. Smith,* 117 N. C., 809; *State v. Johnston,* 139 N. C., 640; *State v. Herring,* 145 N. C., 418. We may say, though, that the case last cited, so far as the reasoning of the Court is concerned, has some bearing upon the case under consideration, as it was an indictment for retailing, the Court deciding that the defendant had aided and abetted an unlawful sale, at a place where the sale of liquor was prohibited, in that he had assisted the vendor to make the sale by soliciting orders and delivering the liquor to the parties who gave them, thereby becoming the seller's agent in the transaction. The defendant was held to have been a principal and liable to indictment as such. We have shown that, without regard to the manner of conducting the sale, the statute makes the intermediary the agent of the seller, and he is therefore criminally liable as principal under the doctrine in *Herring's case.*

The defendant testified that he was not the seller's agent, but this can make no difference, as the Legislature had declared otherwise, and he could not, by his testimony, annul or change the law.

No error.

STATE v. J. L. WHITLOCK.

(Filed 16 December, 1908).

Municipal Corporations — Ordinances — Aesthetic Considerations — Private Rights.

It is not within the police power of a municipality to regulate the placing and height of billboards on the land of the owner, and a penalty prescribed and imposed upon the owner for violating the provisions of such ordinance of the city of Asheville, is not enforcible. (*Small v. Edenton*, 146 N. C., 527; *Tate v. Greensboro*, 114 N. C., 399, cited and distinguished).

ACTION tried before *Peebles, J.*, and a jury, April Term, 1908, of BUNCOMBE, on appeal from police court. From judgment rendered defendant appealed to the Supreme Court.

The defendant was charged before the police court of Asheville with a violation of the billboard ordinance of that city, as follows:

"Section 1. That all billboards now in use in the city of Asheville or which may hereafter be used in said city, shall be securely placed and kept at a distance of at least two feet more than the height of said billboard from the outer edge of the sidewalk of the street.

"Section 2. That any bill poster or owner of any billboard in the city of Asheville, who shall place any billboard, or allow any billboard to remain nearer the edge of the sidewalk than the distance prescribed in section 1 of this ordinance, shall be fined $5 for each day the said billboard is allowed to remain."

Assistant Attorney-General Hayden Clement for State.
Craig, Martin & Winston for defendant.

BROWN, J. Without going into that feature of the case, we are of opinion that the charter of the city of Asheville confers ample power upon the municipal authorities to regulate generally the construction and use of billboards within its limits. And it follows, that unless the ordinance in question is an unreasonable and unnecessary restriction of the right of the land owner to erect structures upon his land, it must be sustained as a proper exercise of the police power of the State.

Aesthetic considerations will not warrant its adoption, but those only which have for their object the safety and welfare of the community. It is conceded to be a fundamental principle under our system of government that the State may require the individual to so manage and use his property that the public health and safety are best conserved. It is to restrict the owner in those uses of his property which he may have as a matter of natural right, and make them conform to the safety and welfare of established society, that the police power of the State is invoked.

While this is true, yet it is fundamental law that the owner of land has the right to erect such structures upon it as he may see fit, and put his property to any use which may suit his pleasure, provided that in so doing he does not imperil or threaten harm to others. Tiedman Lim., 439.

All statutory restrictions of the use of property are imposed upon the theory that they are *necessary* for the safety, health or comfort of the public, but a limitation which is unnecessary and unreasonable cannot be enforced. Although the police power is a broad one, it is not without its limitations, and a *secure* structure upon private property, and one which is not *per se* an infringement upon the public safety, and is not a nuisance, cannot be made one by legislative fiat and then prohibited. *Yates v. Milwaukee,* 10 Wall., 497; 1 Dillon Mun. Corp., 374.

It is undoubtedly within the power of the corporate authorities of the city of Asheville to prohibit the erection of *insecure* billboards or other structures along the edge of the public streets, or so near as to be a menace, to require the owners to maintain all structures so located in a *secure* condition, and to provide for inspection and removal at the owner's expense, if condemned as dangerous. The city authorities may also adopt regulations as to the manner of construction of billboards, so as to insure safety to the passers by, but the prohibition of structures upon the lot line, however safe they may be, is an unwarranted invasion of private right, and is so held to be by all the courts which have passed upon the precise question, as we are now advised.

In the case of the *City of Passaic v. Patterson Bill Posting Co.*, it is held that a city ordinance requiring that signs or billboards shall be constructed not less than ten feet from the street line is a regulation not reasonably necessary for the public safety, and cannot be justified as an exercise of the police power. 72 N. J. Law, 285. In support of the decision is cited *Crawford v. Topeka,* 51 Kan., 756, and *Commonwealth v. Boston Advertising Co.*, 188 Mass., 348, cases directly in point. In that case the New Jersey Court says: "The very fact that this ordinance is directed against signs and billboards only and not against fences, indicates that some consideration other than the public safety led to its passage."

The Court attributes the adoption of the ordinance to aesthetic considerations, rather than to an exclusive regard for the public safety, and says: "Aesthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation." See, also, *People v. Green,* 83 N. Y. Supp., 460; *Bill Posting Co. v. Atlantic City,* 71 N. J. Law, 73.

The ordinances considered by the Kansas, New Jersey and Massachusetts Courts are perhaps more clearly identical to the one in question than in any other cases reported, but the same principles of law concerning the constitutionality of such ordinances are stated with force in *Chicago v. Gunning System,* 214 Ill., 628; 70 L. R. A., 230, as well as in *Litts v. Kessler,* 54 Ohio St., 73; *Bostock v. Sams,* 95 Md., 400; *Bryan v. Chester,* 212 Pa., 259; *Koblegard v. Hale,* 53 S. E., 793.

In *Bryan v. Chester, supra,* the Supreme Court of Pennsylvania says, at p. 262: "It is doubtless within the power of the city to prohibit the erection of *insecure* billboards or other structures, require the owners to maintain them in a secure condition and to provide for their removal at the expense of the owners in case they become dangerous. Perhaps regulations may be made with reference to the manner of construction so as to insure safety, but the prohibition of the erection of structures upon the lot line, however safe they might be, would be an unwarranted invasion of private right."

There is nothing in the case of *Rochester v. West,* 164 N. Y., 510, relied on by the State, which conflicts with this view, as in that case the power of the city to regulate the height of billboards was the only question considered.

This precise question has not been presented to this Court before. The case differs from the cases of *Small v. Edenton,* 146 N. C., 527, and *Tate v. Greensboro,* 114 N. C., 399, because in both of those cases the regulation dealt with objects located on public property, awnings on sidewalks in one case, and trees growing on land dedicated to the city for a public street, in the other. An application, however, of the principles recognized in those cases to the one in question, tends strongly to support the contention that the ordinance under consideration is invalid as an unnecessary restriction of private right.

The motion to quash should have been allowed.

Reversed.

STATE v. AVERY MATHIS.

(Filed 16 December, 1908).

1. **Stock Law—County Commissioners—Territory—Boundaries.**
   In pursuance of an election held under Revisal, sec. 1684, resulting in favor of the stock law, it is competent for the county commissioners to forbid stock from running at large within the county, and declare a mountain range, a creek, a fence, or other natural line, as the limit within which the law shall operate.
2. **Same—Fence—Adjoining County.**
   When the stock law is in force in a county, under the provisions of Revisal, sec. 1684, and the defendant, prosecuted for its violation, lives within a short distance from the dividing line of that and adjoining county wherein the stock law was not operated, and wilfully permits his stock to run at large, it is not a valid defense that no fence had been built on the line to prevent the stock from the adjoining county to run at large on his side of the line, when the county commissioners had declared the line to be a mountain range or other natural or political line.

ACTION tried before *Ferguson, J.*, and a jury, July Term, 1908, of McDOWELL.

This was a prosecution instituted before a Justice, and carried by appeal to the Superior Court. Pursuant to the provisions of sec. 1684, Rev., an election was held in McDowell County for the purpose of ascertaining whether the "stock law" should be established in said county, at which a majority of the votes were cast for the law. Pursuant to the provisions of the statute, and the election, the commissioners of said county made the following order: "It is ordered by the Board that the Blue Ridge Mountains or mountain range be, and the same is hereby declared a lawful fence, for all intents and purposes, from the Swannanoa tunnel to the corner of Mitchell, Burke and McDowell counties; that the Linville Mountain or mountain range be, and the same is hereby declared a lawful fence, for all intents and purposes, from the Mitchell County line to the southern end of said mountain or mountain range; that the mountain or mountain range known as Pond Ridge be, and the same is hereby declared a lawful fence, for all intents and purposes, from the point where it joins Linville Mountain down to the point where the McDowell and Burke County line leaves said ridge or mountain."

McDowell and Yancey counties adjoin, and North Cove Township joins Yancey County where the Blue Ridge is the line between said counties. There are no gates or other obstructions across the public road at the county line on top of the mountain, and stock can pass across said line. Yancey County has no stock law. Defendant lives in North Cove Township in McDowell County, some six or eight miles from the county line. Defendant permitted his hogs to run at large after the order was made by the commissioners. He contended, that until the commissioners built a fence or put obstructions to prevent stock in Yancey County from coming into McDowell County, he could not be compelled to confine his stock. The Court instructed the jury that if they were fully satisfied from the evidence that the defendant wilfully permitted his hogs to run at large, after the county of McDowell had been declared in the stock law, after said stock law election, and after the time fixed by the commissioners for the confinement of stock, they would return a verdict of guilty, and the defendant excepted. There was a verdict of guilty. Judgment and appeal.

Assistant Attorney-General Hayden Clement for the State.
W. T. Morgan for defendant.

CONNOR, J. In *Laws v. R. R.,* 52 N. C., 468, *Judge Battle* says: "In England, where all, or nearly all, the lands were enclosed by the respective owners, the law requires that each proprietor shall keep his horses, cattle and other live stock on his own premises, and if he permits them to go upon the land of another, it will be a trespass for which he will be responsible." He proceeds to give an interesting account of the change adopted in this country, by reason of the different "conditions of things," concluding that, by the statutes requiring every planter to maintain, around his cultivated land, a fence of prescribed height, "general common, because of vicinage, throughout the State was established." It was, upon this ground, held that an owner of cattle was not required to fence them in and, therefore, not liable for damages done by them in going upon the lands of another. *Judge Manly,* in *Jones v. Witherspoon,* 52 N. C., 555, citing *Laws' case,* says that, by common usage, the right of general common became the common law of this State. While this is true, it does not follow that the Legislature may not re-enact the common law or make that law the statute law of the State. If the condition, in respect to the agricultural system of the people so changes as to make it conducive to their interest to require all stock to be "fenced in" and relieve the land owner of the duty to "fence it out," we can see no good reason why the Legislature may not by appropriate legislation do so, either in respect to the whole State or political divisions thereof. For the past twenty-five years, such has been the policy of the State, as evidenced by our legislation. This being true, we do not see why the Legislature, or when power is conferred upon them, the county commissioners, may not forbid stock running at large in the county, or any township thereof, and declare a mountain range, a creek or other natural political boundary a lawful fence, or the limit within which the law shall operate.

Certainly it is immaterial to the citizens of the county adopting such law that no natural or artificial obstruction is provided. If any one may complain, it is the people of the adjoining county or township. It is not very clear how the defendant has any just ground of complaint that provision is not made for preventing stock from Yancey County coming into McDowell. He is charged with permitting his hogs to trespass on his neighbors in McDowell. A fence between that county and Yancey could not possibly affect him in respect to the right of his neighbors to require him to "fence in" his stock for their protection. It is only the people of Yancey County who would be in a position to complain that their stock was fenced out by an imaginary line. The answer to them, however, would be that, if they wish a fence on the line, to keep their stock off the lands of the people of McDowell, they must build one themselves. While it is usual for the counties or townships which adopt a "stock law" to build a common fence, it is not necessary that they do so. Many creeks, swamps and other natural boundaries have been declared lawful fences, without regard to their width or depth. The only possible reason why the validity of the statute and the order of the commissioners could be called into question by the Court, is that it is unconstitutional. If there was any doubt in regard to the power of the Legislature to declare the line a lawful fence, the defendant is not in a position, in this case, to raise it. *St. George v. Hardie*, 147 N. C., 88. The instruction of his Honor to the jury was correct. There is

No error.

STATE v. BERRY DUNLAP.

(Filed 22 December, 1908).

1. **Manslaughter—Evidence—Self Defense—Character of Deceased.**
In a trial under an indictment for murder, evidence of the dangerous or violent character of deceased is inadmissible when there is no evidence of self-defense.

2. **Manslaughter—Evidence—Self Defense—Instructions.**
When there is no evidence that deceased was armed in the voluntary fight with the prisoner which resulted in his death, and evidence that the prisoner was warned not to kill deceased, but after a few minutes' fighting the prisoner shot and killed him, there is no error in the charge of the trial Judge that there was no evidence of self-defense.

INDICTMENT for murder, tried before *Peebles, J.*, and a jury, July Term, 1907, of SWAIN.

The solicitor announced that the State would not ask for a verdict of murder in the first degree. The defendant was convicted of manslaughter, was sentenced to three years' imprisonment in the State's prison, and appealed.

Assistant Attorney-General Hayden Clement for the State.
J. Frank Ray, Walter E. Moore and *Alley E. Picklesimer* for defendant.

PER CURIAM. There are only two exceptions presented in the record. The first was taken to the ruling of the Court excluding evidence of the deceased as a dangerous and violent man. The second was to the charge of the Court that there was no evidence of self-defence. If the last ruling is correct, the first is necessarily so.

The only evidence in the record is the testimony of the State's witnesses, which tends to prove that the encounter in which the prisoner killed the deceased was voluntary upon the part of both; that the prisoner invited the deceased to alight from his horse for the purpose of entering into the fight; that after they were clinched the witnesses several times warned prisoner not to shoot deceased, and told prisoner that it was unnecessary, but after two or three minutes of fighting the prisoner shot the deceased and killed him.

The evidence is clear that deceased was unarmed in the fight, as the brass knucks, the only weapon found on his person, were in his pocket under a bag of candy, and evidently had not been taken out during the fight. The authorities all sustain the ruling of the Court below. *State v. Medlin,* 126 N. C., 1127; *State v. Byrd,* 121 N. C., 684; *State v. Booker,* 123 N. C., 713; *State v. Exum,* 138 N. C., 602; *State v. Walker,* 145 N. C., 567.

Affirmed.

STATE v. JOSEPH LANCE.

(Filed 22 December, 1908).

1. **Appeal and Error—Prejudice—Presumption.**

   When the offense charged is bailable and the trial Judge orders the prisoner, who was then under bail, into custody in the absence of the jury, and afterwards offers to release the prisoner on bail, without reference to the matter in the presence of the jury, the inference is that the Judge considered the bond insufficient, and the presumption is that no error was committed.

2. **Manslaughter—Evidence—Recklessness.**

   When evidence is offered tending to show the reckless indifference of the prisoner on trial for manslaughter, and not to impeach his character, and is relevant to the inquiry as characterizing the act of shooting, which resulted in death, it is competent.

3. **Evidence — Instructions as to Admissions — Objections—Appeal and Error.**

   An assignment of error to the charge of the trial Judge, in stating an admission of fact, will not be considered on appeal, as such matters are for him to settle; and if no such admission was made, objection should be made at the time so that he may correct the error.

4. **Instructions—How Construed—Error in Part—Cured.**

When a detached part of a charge to the jury, taken by itself, erroneously places the burden of proof upon the defendant, on trial for manslaughter, to show matters of mitigation, excuse, etc., but when construing the charge as a whole this part of the charge is correctly made to depend upon other facts, should they so find them, and the burden is then properly placed, there is no error.

5. **Manslaughter—Malice—Instructions.**

When there was evidence tending to show that the prisoner recklessly fired his pistol from a moving train for the purpose of frightening the deceased, who was near the right-of-way of the railroad, and that deceased was killed thereby, there is no error in a charge, that if defendant fired the fatal shot recklessly, but without intent to kill, it would be manslaughter, which is the unlawful killing of one person by another without malice.

6. **Punishment Excessive—Cruel or Unusual—Constitutional Law.**

In this case, punishment for nine years in the penitentiary was not excessive, or cruel or unusual, within the meaning of the Constitution.

ACTION tried before *Ward, J.*, and a jury, August Term, 1908, of BUNCOMBE.

The defendant was indicted for the murder of Alma Green. The evidence tended to show that he was riding in the front compartment of a car on a train which runs from Asheville to Hendersonville. When the train was about 800 yards beyond a station called Buena Vista, the defendant said to Early Marshall, "Watch me make that girl bounce," and then fired his pistol through a hole in the door (or window) of the car and in the direction of the deceased, who was standing with her brother on an embankment of a cut, about 8 or 9 feet high, through which the train was passing at the time. After the shooting, the defendant turned around and said, "I am a mean man," and pulled his sleeve up and showed a scar, and then remarked, "I was shot there once and I fixed the man that did it." Just after the shot was fired the girl fell into her brother's arms.

S. C. Eaton, one of the State's witnesses, who was deputized to arrest the defendant, testified:

"Q. Did you have any conversation with Joseph Lance after that? A. Yes, after he was put in my charge, inside of the baggage car, he came to me and said, 'I see you are an Odd Fellow,' and he said 'So am I,' and he said 'How is the girl?' and I said, 'The doctor says that she can't live but a little time,' and he seemed to be quite affected, and he said, 'Let me out,' and I said 'I can't do it;' and he said, 'As an Odd Fellow can't you turn me out this door?' and I said, 'No, I can't, because I don't think the pledge goes that far.'

Q. What was done after that? A. After he was talking to me, he started toward the door and I stepped between him and the door, and told him he could not get out."

There was testimony tending to show that after the girl was shot the defendant dropped a box containing No. 38 cartridges. His pistol was examined and one chamber was found empty. The calibre of the pistol was No. 38, and the ball that killed the girl was also No. 38. The defendant denied that he had shot the girl, but inquired if she was dead. There was testimony tending to show that two or three shots were fired, one from the steps of the car, at the time the girl was killed. Other testimony was introduced, but it is not necessary to set it out, as so much has been stated as will present the questions raised by the exceptions. The defendant was convicted of manslaughter. His motion for a new trial having been overruled and judgment entered upon the verdict, he appealed.

Assistant Attorney-General Hayden Clement, Frank Carter, H. C. Chester and *Mark W. Brown* for the State.

H. B. Carter, Craig, Martin & Winston, V. S. Lusk and *Jones & Williams* for defendant.

WALKER, J., after stating the case: The defendant assigned as error that, at the beginning of the trial, he was under bond in the sum of $7,000, the State not insisting on a conviction for murder in the first degree, and that, during the trial, the

Court ordered him into custody and refused to bail him, when he was not indicted for a capital felony. It appears from the facts found by the Court with regard to this exception, that the defendant was ordered into custody and no request was made at the time for bail. The Court afterwards offered to allow bail, but counsel stated that it was not necessary while the Court was actually trying the case. The defendant was ordered into custody during the absence of the jury from the court room, and no reference to the matter was made in the presence of the jury, though they saw the defendant in the custody of an officer. It does not appear that the Court did not act within its legitimate power when it ordered the defendant into custody. As the Court afterwards offered to take bail, the inference clearly is that it thought the bond which had been given was insufficient. We cannot presume that an error was committed. The presumption is the other way. *Graves v. Railroad Co.,* 136 N. C., 7. Besides, we do not see that the action of the Court prejudiced the defendant. "In the conduct of jury trials, much must necessarily be left to the judgment and good sense of the Judge who presides over them." *State v. Laxton,* 78 N. C., 570.

The testimony introduced by the State, that the defendant was under the influence of liquor at the time he fired his pistol, was competent to show his condition in connection with the other testimony tending to prove his reckless indifference to the rights and safety of others. What he said and did were relevant to the inquiry as to the character of his act in shooting at the girl. *State v. Kale,* 124 N. C., 816. This case is not like *State v. Castle,* 133 N. C., 776, for the evidence was not offered to impeach the character of the defendant.

The defendant assigns as error that the Court charged the jury as follows: "It is admitted that the girl, Alma Green, is dead, and that she came to her death by a pistol ball fired at her." It is for the Judge to say what is admitted during the trial, and we cannot review his finding. If no such admission was made, the defendant should have objected at the time, so that the Judge could have corrected the error, or misunderstanding, if there was any. *State v. Davis*, 134 N. C., 633; *State v. Tyson*, 133 N. C., 692; *State v. Brown*, 100 N. C., 519. We do not see, upon an examination of the evidence, that the fact alleged to have been admitted was contested. The proof as to it was all one way. However, we do not base our ruling upon that ground. There was no suggestion in what the Judge said that the defendant shot the deceased.

The defendant excepted to the following instruction of the Court: "The burden is upon the defendant of showing all the circumstances of mitigation, excuse or justification, to the satisfaction of the jury." This was not all the Judge said. His instruction was as follows: "It is a principle of the criminal law, that where the killing with a deadly weapon is admitted or proven, that is established as a fact in the case, the law implies or presumes malice, and if nothing else appears, it is murder in the second degree, and when that presumption is raised by the admission or proof of the fact of the killing, the burden is upon the defendant of showing all the circumstances of mitigation, excuse or justification to the satisfaction of the jury; that is to say, when one person kills another with a deadly weapon wilfully, the law, by the use of that deadly weapon in the killing, raises the presumption or implication of malice, and if nothing else appears in the case, and that fact is proven beyond a reasonable doubt, the party indicted is guilty of murder in the second degree under the laws of this State."

The Court, as will appear by reference to the charge, did not place the burden upon the defendant to show affirmatively, or by independent proof, facts or circumstances of mitigation or excuse, but directed the attention of the jury to all of the evidence. *State v. Castle*, 133 N. C., 769, is not like this case, though the admitted principle as therein stated is sufficient to sustain the charge in this case. The charge must be considered as a whole and not in detached portions. *State v. Exum,* 138 N. C., 599.

The only other exception to the charge requiring consideration is the one to the following instruction: "If you should find from the evidence and beyond a reasonable doubt that the defendant fired the shot that killed the girl, and that it was done recklessly, but without intention to kill, it would be manslaughter, and your verdict in that case would be manslaughter, which is the unlawful killing of one person by another, but without malice." This instruction is fully supported by the authorities. In 1 McClain Crim. Law, sec. 325, the law is thus stated: "Where an act in itself unlawful is intentionally done for the purpose of killing or inflicting serious bodily injury and death ensues, it is murder at common law although the intention is not directed towards any particular person. So it is when death results from discharging a firearm in the direction of another with reckless indifference to consequences, if the act is likely to result in the death of the person toward whom the shot is fired, or where it is caused by discharging a firearm into a crowd of persons with intent to kill some one, or with criminal recklessness. In general, to cause death by wilfully doing an act calculated to endanger life or cause great bodily harm will be murder, although there is no specific intent to kill. But if the intention, although unlawful, was not to cause death or great bodily injury, and death accidentally or unexpectedly resulted, the offence is not murder but manslaughter. The negligence or unlawfulness may be sufficient to make the act criminal, although not sufficient to show malice aforethought." See also *State v. Vines,* 93 N. C., 493; *State v. Capps,* 134 N. C., 630, 631.

The charge of the Court presented the case fully and fairly to the jury in every phase of the evidence, and was as favorable to the defendant as the law permitted.

The punishment—nine years' imprisonment in the penitentiary—for so grave an offence, can hardly be considered as excessive and is certainly not cruel or unusual within the meaning of the Constitution. The exception to the judgment for this reason is, therefore, clearly without any merit.

We find no error in the rulings and judgment of the Court below.

No error.

STATE v. FISHER.

(Filed 22 December, 1908).

1. **Murder—Conviction in Second Degree—Instructions—Evidence as to First Degree.**
   When, upon trial for murder, the prisoner has been convicted of murder in the second degree, there is no reversible error in the refusal of the trial Judge to charge that there was no evidence sufficient for conviction of murder in the first degree.
2. **Murder—Evidence—Character of Deceased—Self Defense.**
   When, upon a trial for murder, the prisoner has not testified, and the only evidence of the manner of killing was given by eye witnesses, containing no element of self-defense, testimony of the dangerous character of the deceased should be excluded, on objection.
3. **Witnesses—Character—Evidence Impeaching—Contradictory.**
   It may be shown, on cross-examination, by the State, to impeach defendant's character witness, that this witness had offered a reward for prisoner and therein, and otherwise, had stated and published that he was a man of dangerous character, though the trial is for murder, without element of self-defense, and with direct evidence as to the manner of the homicide.

ACTION tried before *Ferguson, J.,* and a jury, Fall Term, 1908, of POLK.

The prisoner was indicted for, and convicted of, the murder in the second degree of R. F. W. Alston, and appealed from the judgment of the Court.

Assistant Attorney-General Hayden Clement for the State.
Defendant not represented in this court.

BROWN, J. The prisoner assigns as error the refusal of the Court to instruct the jury that there is no evidence of murder in the first degree. It is unnecessary to consider this exception as the prisoner was convicted of the lesser offense of murder in the second degree. *State v. McCourry,* 128 N. C., 599.

The next four assignments of error relate to the exclusion of certain evidence for the purpose of proving that the deceased was a dangerous and violent man. The questions asked for the purpose of eleciting such evidence were put to the State's witness, Swann, upon cross-examination by prisoner. They were objectionable in form, and should have been excluded for that reason, but had they been unobjectionable in that respect they were then incompetent. When these questions were asked the witness the prisoner had not testified. The only testimony that had been introduced was the testimony of the two State's eye-witnesses to the homicide; therefore the Court properly excluded the questions and answers, for the reason that the killing was not circumstantial and there was no element of self-defense, as testified to by the State's witnesses. *Turpin's case,* 77 N. C., 473; *State v. Banner,* at this term.

At the time such evidence was sought to be introduced by the prisoner, nothing had been offered tending to show a killing in self-defense, nor were the manner and circumstances of the killing in doubt.

It is doubtful, to say the least, if the prisoner's own evidence, if taken to be true, makes out a case of self-defense, but certainly, at the time he sought to prove the character of the deceased, there was nothing in evidence upon which such defense could be predicated.

Assignments 6, 7, 8 and 9 relate to exceptions of a similar character.

On cross-examination the solicitor asked the witness, W. C. Robinson, who was a character witness for the prisoner, the following question: "Didn't you state in the offer of reward for the prisoner that he was a dangerous and violent man?" This question and answer were competent in this connection, inasmuch as they tend to contradict the evidence of the witness. The prisoner, by introducing witness Robinson, a character witness, had put his character in evidence, and it was therefore proper to impeach the witness' testimony of the prisoner's character. This could be done either by showing contradictory statements that the witness had made, or by showing the circulation of circulars sent out by the witness describing prisoner as a dangerous and violent man, and also by asking the witness concerning a letter he had written one Holmes, describing the prisoner as such.

Upon a careful review of the record we find

No error.

STATE v. HENRY BRANNER and MERRITT BECK.

(Filed 22 December, 1908).

1. **Pleas—Retraction—Discretion of Court.**

Whether a prisoner may retract a plea of guilty and enter a plea of not guilty, or *vice versa,* is a matter for the sound legal discretion of the trial Court.

2. **Same.**

The trial Judge can, in his sound discretion, set aside a plea of guilty when, in his judgment, or for other good reason, it appears to have been improvidently entered; but he thereafter has no power to enter a verdict of not guilty and discharge the prisoner.

3. **Plea—Confession—Indictment—Variance.**

Upon a plea of guilty to an indictment the guilt of the prisoner is thereby established, and the plea eliminates all questions of variance between the offense charged and the proof.

4. **Religious Meetings — Disturbance — Indictable Offense—Sunday-school.**
   A person who wilfully disturbs an assembled Sunday-school held in a place for the purpose, is indictable both at common law and under Revisal, secs. 3704 and 3706.

5. **Appeal and Error—Indictment—Judgment, Erroneously Entered—New Trial—Solicitor's Discretion.**
   Should a new trial be awarded upon appeal by the State from a judgment of not guilty, erroneously entered by the trial Judge, because the evidence did not correspond with the indictment, the question of adding another count to the bill, or sending in a new bill, is one for the solicitor alone.

6. **Appeal and Error — Criminal Offense — Erroneous Judgment — Prisoner Discharged.**
   The State has no right of appeal from the action of the trial Judge in striking out a plea of guilty and entering erroneously a plea of not guilty and discharging prisoner, upon a trial for an indictable offense, as no jurisdiction thereof is given the Supreme Court by the statute. Revisal, sec. 3276.

ACTION tried before *Peebles, J.*, July Term, 1908, of SWAIN.

Hayden Clement and *J. W. Bailey* for State.
Shepherd & Shepherd for defendant.

WALKER, J. The defendants were indicted in two counts, first, for wilfully interrupting and disturbing a meeting of people held for the purpose of public worship in "Bradley's Chapel Church," and, second, for being intoxicated and conducting themselves in a rude and disorderly manner at Bradley's Chapel, it being a place where people are accustomed to assemble for the purpose of divine worship and while they were so assembled for such purpose. The bill sufficiently charges the commission of a criminal offense. The defendants entered a plea of guilty. The case then states that the Court heard the evidence, and it appearing that the disturbance occurred on a certain day at a Sunday-school held at Bradley's Chapel, which was used for preaching, but there was no preaching on that day, and the Court being of the opinion that there was a fatal variance between the allegations and the proof, ordered the plea of "guilty" to be stricken out and a verdict of "not guilty" to be entered, which was accordingly done, and the defendant discharged. The State excepted and appealed.

A confession of the defendant may be either express or implied. An express confession is where he pleads guilty and thus directly, and in the face of the Court, admits the truth of the accusation. This is called a plea of guilty and is equivalent to a conviction. 1 Chitty's Cr. Law, 429. The Court then has nothing to do but to award judgment as upon a verdict of guilty (4 Blackstone, 329), but, of course, may hear evidence for the purpose of enabling it to determine the measure of punishment. Clark's Cr. Procedure, p. 372. In *Green v. Com.*, 12 Allen (Mass.), 172, the Court said, when referring to the subject: "If a jury would be warranted in finding a person guilty of a particular offense charged in an indictment, the party accused may confess such offense by a plea of guilty; in other words, a plea of guilty may be supported whenever a verdict of a jury finding a party guilty of a crime would be held valid. A conviction of crime may be had in two ways; either by the verdict of a jury, or by the confession of the offense by the party charged by a plea of guilty, 'which is the highest conviction.' The effect of a confession is to supply the want of evidence. When, therefore, a party pleads guilty to an indictment, he confesses and convicts himself of all that is duly charged against him in that indictment," citing 2 Hawkins P. C., ch. 31; ch. 433, sec. 120; 4 Blk. Com., 362. The defendant will generally, but not necessarily, be allowed to retract his plea of guilty and plead not guilty. A defendant may also withdraw his plea of not guilty, even after it is recorded, and plead guilty. The motion to retract in either case is addressed to the sound discretion of the Court and a retraction is not a matter of right.

Clark's Cr. Pro., p. 373; *Mastronado v. State,* 60 Miss., 86. A plea of guilty is not only an admission of guilt, but is a formal confession of guilt before the Court in which the defendant is arraigned. It is, in this respect, altogether different from a full and voluntary confession, formally made before a magistrate or to some other person. The latter is merely evidence of guilt. Clark's Cr. Pro., *supra.* When the plea of guilty is formally entered to an indictment, no evidence of guilt is required in order to proceed to judgment, for the defendant has himself supplied the necessary proof. He has convicted himself. The Judge could, therefore, have entered judgment upon the plea in this case, in like manner as he could have done if there had been a formal verdict of guilty returned by a jury upon evidence. While this is true, the Court had the power to set aside the plea of guilty if it was entered unadvisedly or improvidently, or for any other good reason, but it could not, after striking out the plea, enter a verdict of not guilty or discharge the defendant, and in doing so, the Court committed an error. *State v. Curtis,* 28 N. C., 247. When the plea of guilty was stricken out, a new trial should have been awarded, and the defendant held to plead to the indictment again. In *State v. Curtis, supra,* it is said: "Even if the verdict of 'guilty' had been expressed to be 'subject to the opinion of the Court' upon a point of law reserved, the Court would only have had the power, if the opinion on that point was for the defendant, to set aside the verdict. There would be no authority to go another step, and change the verdict from one that the defendant was guilty, into one that he was not guilty. That can only be done when the verdict is in that respect special, that is, when in a certain event the defendant is found guilty by the jury, and it is added, 'otherwise not guilty,' or the like. But here, in the record, the verdict is in no degree conditional or dependent, but is a general and absolute verdict of guilty, and the Court has no power to do more than either to proceed to sentence on it, or set it aside and award a *venire de novo,* or grant a new trial. The case now stands as if no trial had ever been had. The judgment must therefore be reversed and the case tried again."

Our case is stronger than this one, for here no jury had been empaneled, and the verdict of not guilty was not in any sense the verdict of a jury, but the verdict of the Judge, which is a legal anomaly. It is well to add that a Judge cannot compel a defendant against his will to plead not guilty and submit to a trial, for undoubtedly a prisoner of competent understanding, duly enlightened, has the right to plead guilty instead of denying the charge, yet, in proportion to the gravity of the offense, the Court should exercise caution in receiving this plea and should see that he is properly advised as to the nature of his act and its consequences. This is a matter which is left to the good judgment and discretion of the Court, which should be exercised so as to protect a defendant from an improvident plea and to prevent injustice. 1 Bishop's New Cr. Procedure, sec. 795.

We have regarded the order of the Court, by which the plea of guilty was stricken out, as made at the defendant's request, or at least with his consent, as he accepted the benefit of what was done. The indictment alleges a criminal offense, and as the Judge has stricken out the plea of guilty and had no power to enter a verdict of not guilty, the case would stand as if there had been no plea, provided the invalidity of the Court's action is shown in the proper way. We will not suggest the procedure, as that matter is not now before us.

The doctrine of variance did not apply to this case, as it relates only to evidence introduced to establish guilt, but not to any received after conviction, whether by verdict of a jury or confession of guilt in open court. The guilt is then legally ascertained and no further evidence of it is required. *State v. Moore,* 120 N. C., 565.

We think that a person who wilfully disturbs a Sunday-school was indictable at common law and our statutes are amply sufficient to cover such a case. 2 McLain Cr. Law, 1022; *State v. Jasper, supra;* 2 Wharton's Cr. Law (9 Ed.), sec. 1556a and notes. Revisal, sec. 3704 and 3706; *Martin v. State,* 6 Baxter, 234. The solicitor can send a new bill and add another count if he finds that the evidence may not correspond with the allegations of the present indictment. This is a matter for his consideration alone.

The real difficulty presented in the case here is whether the State had the right to appeal. We think not. The statute now regulates this matter and it provides: "An appeal to the Supreme Court may be taken by the State in the following cases and no other. Where judgment has been given for the defendant: 1. Upon a special verdict. 2. Upon a demurrer. 3. Upon a motion to quash. 4. Upon arrest of judgment." Revisal, sec. 3276. *State v. Savery,* 126 N. C., 1083. While, therefore, error appears in the proceedings below, we cannot reverse the action of the Court, as we have no jurisdiction, by reason of the statute, to do so, but we have considered the merits of the case to some extent, as they were fully discussed before us and we were asked to do so.

Appeal dismissed.

STATE v. JOHN THOMAS.

(Filed 22 December, 1908).

Fences—Barbed Wire—Statutes, Interpretation of—Spirit and Mischief.

A board fence with strands of barbed wire on the top, built within ten yards of a public road or highway, in a county to which Revisal, sec. 3769, applies, comes within the mischief at which the statute is directed, and the person erecting or maintaining it is guilty of a misdemeanor.

ACTION tried before *Peebles, J.*, and a jury, July Term, 1908, of SWAIN.

Defendant was charged with wilfully and unlawfully building and maintaining a barbed wire fence along a public road and within ten yards thereof, without putting a railing or plank on top of said fence, not less than three inches wide, in violation of the statute. The jury found the following special verdict:

"We find that, at the commencement of this action, there was a certain public road running from the town of Bryson City along the lands of the defendant. We further find that the defendant, John Thomas, at the date of the commencement of this action, maintained a certain fence composed of three planks and two barbed wires, within ten yards of said public road. We find that said fence was constructed in the following manner: The three planks were placed at the bottom of the fence, one above another, to a height of from three to three and one-half feet above the ground, and that above said planks were stretched two strands of barbed wire; that there were no planks placed above said wires.

"If upon the above special verdict the Court is of the opinion that the defendant is guilty, then we find him guilty; but if the Court is of the opinion, upon the said special verdict, that the defendant is not guilty, then we find him not guilty."

His Honor being of the opinion that defendant was not guilty, directed a verdict accordingly. The solicitor for the State appealed.

Assistant Attorney-General Hayden Clement for State.
No counsel *contra*.

CONNOR, J. Section 3769, Revisal, is in the following words: "If any person shall erect or maintain a barbed-wire fence along any public road or highway, and within ten yards thereof, without putting a railing or plank on top of said fence not less than three inches in width, he shall be guilty of a misdemeanor and fined or imprisoned at the discretion of the Court. This section shall apply to the counties of Rowan, Swain, Haywood," etc.

The purpose of the Legislature in enacting the statute, and the danger to persons and animals passing along the public highway are manifest. The fence, described in the special verdict, comes clearly within the mischief at which the statute is directed. To hold that the entire fence, except the posts which support the wire, must be made of barbed wire, would render the statute of but little value. We know from common observation that such fences usually have one or more boards, or planks, at the bottom, or next to the ground. The purpose of the Legislature was to protect travelers and stock from danger of coming in contact with the top wire, hence the necessity of a plank, or railing, on top as the statute requires. Giving effect to the language of the act, with a view of effectuating the intent of the Legislature and affording protection against the mischief aimed at, we think that, upon the special verdict, the defendant was guilty of violating the statute. This will be certified to the end that further proceedings may be had in accordance with the law.

Reversed.

STATE v. WILL CLONINGER, JOHN CLONINGER and C. W. COSTNER.

(Filed 22 December, 1908).

1. **Appeal and Error—Instructions—Stating Contentions.**

An exception that the trial Judge narrated facts not found in the evidence is untenable, when it appears that he was stating the contention of a party to the suit supported by the evidence.

2. **Murder—Character Witness—Instructions—Weight of Evidence.**

Upon a trial for a felony, the Judge charged the jury: "You should likewise consider the evidence as to the character of the (defendant's) witnesses, whether that evidence was elicited from the witnesses themselves, on cross-examination, or otherwise, or whether it was told by witnesses who were called to testify as to the character of the other witnesses." *Held*, no error, when, immediately following he instructed the jury, in effect, that such evidence only went to the weight and credibility of the testimony in each instance.

3. **Same—Defendant a Witness.**

When a defendant on trial for a felony goes upon the stand in his own behalf without offering evidence as to his own character, the credibility of his testimony is in question, and the State may introduce evidence tending to show his bad character when it is confined to the purpose of contradiction, or of impeaching his evidence.

4. **Murder — Defendant a Witness — Character — Substantive Evidence.**

Evidence as to the character of defendant on trial for murder is substantive, when he goes upon the witness stand and introduces evidence of his good character.

5. **Character Witnesses—Defendant a Witness—Examination.**

For the sole purpose of contradicting his testimony, it is competent for the State to cross-examine a defendant, a witness in his own behalf, on trial for murder, when he has introduced no evidence as to his character; and the cross-examination is not restricted to matters brought out on the direct examination. Revisal, sec. 1634.

6. **Murder—Insanity—Presumption—Burden of Proof.**

The presumption is that a prisoner on trial for murder was sane at the time of the homicidal act, with the burden on him to prove the contrary.

7. Same—Evidence—Instructions.

Under the "transitory homicidal plea," the prisoner, on trial for murder, testified: "I guess I was unconscious . . . I saw (deceased) coming towards me . . . He said he was going to kill me, I thought he was. I then struck him." This blow was the homicidal act. The following instruction was held no error: "If the prisoner was in a state of mind at the time of the homicidal act to comprehend his relation to others, or, knowing the criminal act, was conscious that he was doing wrong, he was responsible; otherwise, he was not." (*State v. Branner, ante* 559, cited and approved).

8. Murder—Manslaughter—Aider and Abettor—Evidence Sufficient.

When one of the prisoners was present at the time deceased was killed, and, with others, followed deceased, cursing him, and got a baseball bat away from him with which another person struck the fatal blow, there is abundant evidence to sustain his conviction of manslaughter as an aider and abettor.

ACTION tried before *Moore, J.*, and a jury, February Term, 1908, of GASTON.

Will Cloninger, John Cloninger, Charles Costner and Tollie Cloninger were indicted for the murder of John Mauney. Tollie Cloninger was acquitted. The others were each convicted of manslaughter and sentenced respectively, in the order of their names as above, to three, two and one year each on the public roads, and appealed.

There was evidence that John Mauney was struck in the head with a base-ball bat in the hands of Will Cloninger, one of the prisoners, on 3 August, 1907; that the blow caused his death, and that John Cloninger and Charles Costner aided and abetted in the killing.

There had been a ball game near Hardin, and the game was over. When Mauney received the fatal blow he had backed off the ball ground into a pea field. John Cloninger, Will Cloninger and Charles Costner, the prisoners, followed him into a pea field. In pursuing him the following transpired: John Mauney was backing and waving his bat through the ball ground, telling the crowd (the prisoners in the crowd) not to follow him. He backed twenty-five steps. Mauney was angry and talking loud, and seemed to be drinking. John Cloninger was facing Mauney and struck at him with his mandolin, and Mauney struck at John Cloninger with his fist once or twice. The Cloninger boys and Costner were in front of Mauney, Mauney backing. Mauney started to fall, and Costner jerked the bat out of his hand. Mauney got down and John Cloninger and Will Cloninger were on him, and Will Mauney pulled them off. Mauney got up, backed into Make Poole's arms, and John Cloninger grabbed him, and Will Cloninger hit him in the head with a bat and knocked him down, and John kicked him in the side. In backing, Mauney was saying: "Men, stand off of me." Will Cloninger, John Cloninger and Charles Costner were in front of Mauney (all three related). He backed and they followed him. Costner wrung the bat out of his hand. Charles Hester hit Will Cloninger with a base-ball bat when they were backing Mauney. It was a bat that he took from Clifton Knight. John Mauney backed; John Cloninger went towards him with mandolin. Costner was told not to follow Mauney; he cursed and said: "Let him put down that bat." Will and John Cloninger got hold of Mauney, and Costner took the bat away. They got Mauney down, and John Cloninger was pulled off of him. Mauney backed, and John Cloninger followed him; they were knocking; Mauney stumbled and fell. Will Cloninger ran up and struck him in the head—the fatal blow. John Cloninger kicked him several times on the ground.

1. As to evidence against Will Cloninger: He struck the fatal blow with a base-ball bat when Mauney was unarmed and down, and being held by Make Pool.

2. As to evidence against John Cloninger: He was knocking Mauney in a willing fight, and aided Will Cloninger by holding Mauney, who was unarmed, while Will Cloninger

knocked him down with a base-ball bat, and then he kicked Mauney when he was down.

3. As to the evidence against Charles Costner: Costner followed Mauney with the Cloningers, he (Mauney) saying: "Men, stand off of me"; jerked and wrung the bat out of Mauney's hand, and then Will Cloninger got the bat from Costner and knocked Mauney down with it. Costner cursed Mauney and said: "Let him put down that bat," and took the bat from him, when John and Will Cloninger had hold of Mauney, and then let Will Cloninger have the bat to hit the fatal blow. The character of the defendants was shown to be that of desperate, lawless men.

(1) Will Cloninger was drinking the day of the homicide; had been indicted three times; twice for fighting with deadly weapons, and once for retailing.

(2) John Cloninger had been indicted several times for fighting, and was then under indictment for retailing.

(3) Charles Costner had been indicted for fighting with a deadly weapon; indicted for retailing and distilling in Federal Court.

Reputation of Charles Costner year or so before homicide, "bad for selling liquor."

Reputation Will Cloninger, "regular blind tiger." All the boys were dealers in liquor except Tollie.

Assistant Attorney-General Hayden Clement and *Heriot Clarkson* for State.

Burwell & Cansler and *S. J. Durham* for defendants.

CLARK, C. J. The prisoner's brief does not rely on the first three exceptions. The fourth exception is that his Honor narrated facts not found in the evidence, but an examination of the record shows that the Court was stating the contentions of the State, and there was evidence in their support.

The prisoner's exceptions 5 and 6 are to the following instruction: "You should likewise consider the evidence as to the character of the witnesses, whether that evidence was elicited from the witnesses themselves on cross-examination or otherwise, or whether it was told by witnesses who were called to testify as to the character of the other witnesses." Read in connection with that part of the charge which directly follows it, there was no error: "Evidence as to the character of a witness, who is not a defendant, is competent only for the purpose of enabling the jury to place the proper estimate upon the value of the testimony of the witness whose character is under consideration. . . . It is for the jury to say in such case whether the witness told the truth or not; but it is competent to introduce evidence as to the character of a witness in order that the jury may know the character of a witness whose testimony they are considering, and to be thereby aided in determining the weight which is to be given the testimony of such witness."

The seventh exception is to his Honor's charge, as follows: "Evidence as to the character of a witness who is likewise a defendant is competent for two purposes: (1) to enable the jury to place the proper estimate on the testimony of the defendant who is testifying as a witness; (2) as substantive evidence upon the question of guilt or innocence." This part of the charge, when applied to the facts in the case, is correct. Where a defendant goes on the witness stand and testifies, he does not thereby put his character in issue, but only puts his testimony in issue, and the State may introduce evidence tending to show the bad character of the witness solely for the purpose of contradicting him. This is the rule laid down in *State v. Traylor,* 121 N. C., 674, and *State v. Foster,* 130 N. C., 676. But when a defendant introduces evidence himself to prove his good character, then that evidence is substantive evidence, and may be considered by the jury as such.

The defendants, Will Cloninger and Charles Costner, put their characters in issue by examining witnesses to prove their good character. John Cloninger did not do this, nor ever did the State put on evidence to show his bad character, nor for the purpose of contradicting his testimony. The State merely cross-examined him, as it had a right to do, under Revisal 1634. The accused, by becoming a witness in his own behalf, is liable to cross-examination to impair his credit, like any other witness, and the cross-examination is not restricted to matters brought out on the direct examination. The eighth exception is a repetition of the fifth and sixth.

Exceptions 9, 10, 11 and 12 present the "transitory homicidal plea" as to Will Cloninger. The presumption is that he was sane. The burden was on him to show the contrary. *State v. Potts*, 100 N. C., 465. Will Cloninger testified: "I guess I was unconscious. . . . I saw Mauney coming towards me, he said he was going to kill me, and I thought he was. I then struck him." His Honor charged: "If the person at the time of the homicidal act was in a state of mind to comprehend his relation to others, or, knowing the criminal character of the act, was conscious that he was doing wrong, he was responsible; otherwise he was not, and such would be your verdict." This charge follows *State v. Haywood,* 61 N. C., 376, which has been approved since on this point. *State v. Potts,* 100 N. C., 465; *State v. Davis,* 109 N. C., 784; *State v. Branner, ante,* 559, and in other cases.

Exceptions 13, 15 and 16. John Cloninger and Charles Costner were aiders and abettors. There is abundant evidence to sustain a conviction where the bystander is a friend of the perpetrator, and knows that his presence will be regarded by the perpetrator as an encouragement and protection. Presence alone may be regarded as encouraging. *State v. Jarrell,* 141 N. C., 725. To like effect is *State v. Finley and Jimmerson,* 118 N. C., 1161 to 1176, where the Court sustained a conviction of murder in the second degree against the two defendants when it appeared that they were "deviling" the deceased and teasing him, and that one of them struck him and killed him. The Court in that case held that the other was just as guilty, inasmuch as "deviling" and "teasing" was an unlawful act.

Here the prisoners are more guilty, for they were making an assault on the deceased, driving him backwards into a pea field. He repeatedly warned them to stand back and they, with oaths, kept pressing on him. Charles Costner not only lent his presence, but was the man that was endeavoring to take the bat away from him, cursing and telling deceased to give up the bat, and finally jerking the bat out of deceased's hands. As soon as he jerked the bat out of deceased's hands, Will Cloninger took the bat and hit him.

Exceptions 14 and 17 have been considered in the other exceptions. Exception 18 is abandoned, not being in the brief.

This was an important trial. It was a trial of a crowd of disorderly rioters at a baseball game. The painstaking Judge, as appears from the charge, very jealously guarded the rights of the prisoners, giving them many instructions which they asked and some to which they were not entitled. They have had every benefit and advantage of a fair trial.

Indeed, the prisoners have cause to congratulate themselves that they were not tried before a sterner Judge, for Charles Costner, the man who disarmed deceased at the time he was in need of a weapon, only received a sentence of one year's imprisonment; John Cloninger, the man who provoked the difficulty by hitting at deceased with a mandolin, the man who held deceased while his brother struck the fatal blow, and who kicked the deceased after he had been stricken, only received two years' imprisonment; Will Cloninger, the prisoner, who entered the difficulty voluntarily and thereupon became the principal actor, and who finally struck the fatal blow by leaning over his brother's shoulder, hitting deceased, an unarmed man, who was then in the grip of two other men, in the head with a baseball bat, thereby producing death, only received three years' imprisonment.

No error.

HOKE, J., concurring: I concur in the disposition of this case for the reason that the charge of the Court below on the testimony as to character, where one is both witness and defendant, is to be referred, by fair intendment, to those defendants who had introduced evidence as to their character, and should therefore not be construed as applying to the case of John Cloninger at all; certainly there is such doubt about it that the question should be resolved in favor of the validity of the trial. The verdict of guilty has been rendered by an intelligent jury under the supervision of a learned, just and impartial Judge, and should not be disturbed unless error is clearly shown.

CONNOR, J., dissenting: If I understood the testimony in this appeal, as stated in the opinion of the Court, I would concur in the conclusion of the majority. While usually a dissent is based upon a difference of opinion as to the law, upon the facts stated in the opinion, I could not justify my views in this case without setting out from the record a portion of the testimony. The homicide for which the defendants are convicted occurred in an affray at a game of baseball, and but few of the essential elements of the transaction are stated in the same way by any two witnesses. All concur, however, in the statement that the difficulty was begun by the deceased. The first witness for the State says: "When Will Cloninger struck Mauney, he was standing still and nobody had hold of him." Another State's witness, Garrison, said: "John Cloninger did not start at John Mauney with the mandolin, nor did John Mauney strike at John Cloninger with his fist." The only testimony which has the slightest semblance of John Cloninger's holding Mauney, was that of Grady, who said: "John Cloninger grabbed Mauney and Will Cloninger struck over John Cloninger's shoulder." There was much conflicting evidence in other respects, but none, except that quoted, tending to sustain the statement that John Cloninger held Mauney when he was struck. All of the evidence shows that Will Cloninger had been dealt a deadly blow immediately before he struck—that blood was streaming down his face. There was evidence that he was not conscious at the moment he struck. Tollie was indicted with the other defendants, and acquitted by the jury, evidently because they believed his testimony. He gave the following account of the entire transaction: "John Mauney came through the crowd cursing and waving a bat backwards and forwards; the crowd was making a path in front of him. I told Charles Costner, there goes John Mauney with a bat; Charlie said: 'I am a friend of his and I believe I can get him to put it down.' Charlie walked up to him and told him to put down the bat. Mauney told him not to come on or he would kill him. I told him not to hit Charlie; he then struck at me, and Charles Costner knocked the lick off. Mauney looked like he was going to hit Charlie, and Will Cloninger walked in and told him not to do that. Mauney then cursed Will Cloninger and hit him. Will fell to the ground on his hands and knees; John Mauney started to hit Will again, and John Cloninger ran and grabbed him and they went to the ground; they stayed on the ground about one-half a minute, and it looked like the three rose about the same time. John Mauney then knocked John Cloninger back in the direction of Will Cloninger; and when he knocked John off I understood him to say as he went on towards Will Cloninger: 'Damn you, I will kill you.' He was near to Will, and Will raised up the bat and struck him. I then helped Will in the buggy, after I had stood there a little bit. Will was bleeding all down over his shirt and face. I have known John Mauney for ten years; his general reputation as a dangerous and violent man, when drinking, was bad. When John Cloninger and John Mauney went down to the ground, John Mauney had the bat; he dropped the bat and John Cloninger picked it up. I had not seen John Cloninger that day until he grabbed Mauney. John Cloninger had no weapon and did not say a word. John Cloninger did not kick Mauney when he (Mauney) was on the ground after Will Cloninger had struck him."

John Cloninger testified: "The first time that I saw my brother, Will Cloninger, that day since the morning, was when he was knocked down by John Mauney. I had been up at the ball ground about ten minutes when Will was knocked down by Mauney; I saw John when he knocked Will down, he started to hit Will again, when I ran in and grabbed him, we went down on the ground together; we came back up and he was knocking me off from him. I saw Will Cloninger standing on the right-hand side of John Mauney. Will then hit him with the bat. I did not kick John Mauney after he was struck by Will. My purpose in running into John Mauney was to prevent him from hitting Will again. John Mauney and I had been good friends. I did not have any conversation with Charles Costner, Will Cloninger or Tollie Cloninger. I have been indicted several times for fighting; I have also been indicted for selling liquor, but never tried; I have been up for being drunk before the mayor of Bessemer. I did not see Charles Costner when this trouble took place. I walked up close to Tollie Cloninger."

No witness testified as to John Cloninger's general character. The only testimony in regard to him in that respect came from his cross-examination. I do not quote the testimony for the purpose of criticizing the verdict of the jury, or the judgment of his Honor, but to show that the case was one in which any error in the charge of the Court may well have controlled the verdict. It was, upon the evidence, a strongly contested case, and the jury must have found it difficult to reconcile much of the testimony with the guilt of John Cloninger. It was one of those doubtful cases in which evidence of character and the manner in which it was submitted to the jury was of much weight. His Honor's entire charge on the question of character is in the following words: "You should likewise consider the evidence as to the character of the witnesses; whether that evidence was elicited from the witnesses themselves on cross-examination, or otherwise; or whether it was told by witnesses who were called to testify as to the character of other witnesses. Evidence as to the character of a witness, who is not a defendant, is competent only for the purpose of enabling the jury to place the proper estimate upon the value of the testimony of the witness whose character is under consideration. That is, a man of bad character may tell the truth and a man of good character may not tell the truth. It is for the jury to say, in each case, whether the witness had told the truth or not; but it is competent to introduce evidence as to the character of a witness whose testimony they are considering, and to be aided in determining the weight which is to be given the testimony of such witness. Evidence as to the character of a witness, who is likewise a defendant, is competent for two purposes: First, to enable the jury to place a proper estimate upon the value of the testimony of the defendant who is testifying as a witness; second, as substantive evidence upon the question of guilt or innocence. It is competent for one who is charged with a crime to show that his character is good, if he can do so, whether he goes upon the stand as a witness or not; and it is the duty of the jury to consider evidence as to the character of the defendant as substantive evidence upon the main question of guilt or innocence."

It is evident that his Honor intended, as he clearly did, to call the attention of the jury to the different aspects in which the testimony in regard to the character of witnesses and that of the defendants should be considered by them. In this he was correct; but he, inadvertently, as I think, fell into error in saying to the jury that they should consider evidence of character whether elicited from the witnesses themselves on cross-examination, or otherwise—and applying this rule to the defendant, John Cloninger, as "substantive evidence upon the question of guilt or innocence." This Court, without dissent, held in *State v. Traylor,* 121 N. C., 674: "When in the trial of a criminal action, the defendant testifies in his own behalf and introduces no evidence as to his general character, but the State introduces evidence to show that such character is bad, such evidence by the State can be considered only as affecting the credibility of the witness, and not as a circumstance in determining the question of his guilt or innocence." This was the sole point presented and decided; a new trial was granted because his Honor refused to tell the jury that evidence of the defendant's character "could not be allowed to affect the question of his guilt or innocence, but only his credibility as a witness." Instead of giving this instruction, his Honor told the jury that the evidence offered by the State of defendant's bad character could properly be considered by them in determining the question of the guilt, or innocence, of the defendant. This was assigned for error, and this Court unanimously held the assignment good. In that case defendant was charged with forgery and the evidence of his bad character, under our decisions, included his moral character, and it not confined to his character for truth. *State v. Efler,* 85 N. C., 585; *State v. Boswell,* 13 N. C., 209. The ruling of his Honor, in that case, had very much more, in reason, to support it than here. It may well have been argued that the jury should more readily conclude that a man of bad moral character would commit forgery than one of good moral character, but here, even if there had been such evidence, it by no means follows that a man charged with manslaughter, a crime the essential elements of which exclude premeditation or malice, should be convicted because he was once indicted for selling liquor but never tried, and several times for fighting, or that such facts should be cast into the scale against him. *Traylor's case* has been cited and considered as the controlling authority upon this question. In *Foster's case,* 130 N. C., 666, cited in the opinion, this Court, without any exception, having been made *ex mero motu,* said that to permit a witness called to prove the bad character of the prisoner charged with murder to say "that he had the reputation of being 'a little fussy,'" was error, the Court saying: "As the prisoner had gone on the witness stand in his own behalf, it was competent to prove his general character for truth. But the witness testified that he had the reputation of being 'a little fussy.' This evidence was incompetent as the prisoner had not put his character in evidence," citing *Traylor's case.* The law is clearly so stated in *Marcom v. Adams,* 122 N. C., 222. There is not a case cited or to be found in our reports and, I doubt not, in any other court, in which the contrary is held. No one suggests that John Cloninger struck the blow. There is evidence that he was aiding and abetting, and that he kicked Mauney after he was down, but there is also equally as strong evidence that he did neither. Of course, this presented a question for the jury, but they should not have been practically told that they could consider the facts brought out on his cross-examination, having no connection with or relation to this transaction, as substantive evidence of his guilt, unless we are to overrule *Traylor's case.* Certainly, the charge finds no support there, although cited to support the conclusion. I submit that the evidence does not sustain the statement made in the brief of the Attorney-General, copied in the opinion, that John Cloninger "was knocking Mauney in a willing fight, and aided Will Cloninger by holding Mauney, who was unarmed, while Will Cloninger knocked him down with a baseball bat, and then he kicked Mauney when he was down." A perusal of the evidence, I submit, fails to sustain such a conclusion.

John Cloninger may be guilty, but he certainly did not do these things, or, at least, the evidence falls far short of showing it. The other defendants introduced evidence of their good character and, upon the cross-examination of such witnesses, they said that several of the defendants had been indicted for selling liquor and fighting. Whatever may be said of the charge as to these defendants, it was manifestly error as to John Cloninger. There were a number of other exceptions taken on the trial, some of which I think have merit. I do not care to discuss them.

The error, as I view it, as to John, is so manifest and so prejudicial that I have deemed it my duty to say this much. No one can read the entire evidence without being impressed with the fact that a lot of men, employed in harmless sport, were drawn into a fight by the unwarranted interference of the deceased. One witness says: "I saw John Mauney walking through the crowd waving his hat; he looked like he was mad. His general reputation as a violent, dangerous man when drinking, was bad." Another witness says: "Mauney came through the crowd cursing and saying 'stand off me.' He looked as if he had been drinking. I looked around, and when I looked back, I saw five or six men go down." Etta Gray, a State's witness, says: "I saw blood on Will Cloninger's hands when he hit John Mauney. I didn't see any difficulty between John Mauney and John Cloninger. *Nobody was holding Mauney when he was hit.*" Hovis, for the State, says: "No one was holding Mauney when he was struck." The evidence on this point was contradictory. I am sure that the learned, just and conscientious judge who, while engaged in the discharge of his duty has passed away, inadvertently fell into what I submit was an error. I am equally sure that, if living, no one would be more desirous that the error should be corrected. He was an able, learned judge and a just man. I have known none more so.

WALKER, J., concurs in dissenting opinion of *Connor, J.*

O. M. BRITT v. CAROLINA & NORTHERN RAILROAD COMPANY.

PER CURIAM. The defendant comes into court and declares that since the petition to rehear was docketed, the cause of action has been settled and discharged, and asks leave to withdraw the petition to rehear.

Thereupon it is ordered that the petition to rehear be dismissed without prejudice.

STATE v. THOMAS MOSES, Appellant.

PER CURIAM. It appearing that defendant has broken jail and is still at large, the appeal is dismissed. *State v. Jacobs,* 107 N. C., 772; *State v. Keebler,* 145 N. C., 560.

S. R. FOWLE & SON v. ALEX MITCHELL et als.

PER CURIAM. Motion to docket and dismiss under Rule 17. Judgment was rendered 31 July, 1908, continuing a restraining order as an injunction to the hearing. Notice of appeal was served 6 August. No case on appeal is necessary. No transcript has been docketed.

Motion allowed.

APPENDIX.

JOHN W. GRAHAM'S ADDRESS.

In the Matter of

Presenting to the Supreme Court of North Carolina, on behalf of the Murphey family, a portrait of Honorable Archibald D. Murphey, Tuesday, 27 October, 1908.

Following is the address of Hon. John W. Graham, of Hillsboro, at Raleigh, Tuesday, October 27th, the occasion being the presentation to the Supreme Court of North Carolina of a portrait of the late Archibald D. Murphey. The portrait, which was the gift of the family, was accepted by Chief Justice Clark.

Mr. Graham said:

May it Please Your Honors: When the General Assembly of 1818 established the Supreme Court on its present basis, it also provided by a supplemental act that, if a judge of the Supreme Court should be incompetent to decide a case on account of personal interest in the event, or some other sufficient reason, the Governor was authorized to give a special appointment to a judge of the Superior Court, requiring him to sit with the other judges of the Supreme Court to hear and determine all such cases. Under this law Governor John Branch appointed Hon. Archibald D. Murphey, then judge of the Superior Court to act at May and November Terms, 1819, and June Term, 1820, in place of Judge Leonard Henderson, who had been counsel in important cases then before the Court. It has been deemed proper that a portrait of this distinguished judge should take its place among those with whom he served, and that, on the occasion of its presentation, some outline of his character and public services should be given. At the request of those of his descendants and relatives who have complied with the desire of your honorable body to have his features speak from the walls of this room, adorned by so many of our illustrious dead, I undertake this duty, as a friendship extended through more than three generations would not permit me to decline, and I recognize that it is peculiarly appropriate that a resident of the county of Orange should present a tribute to the memory of one who in life served her well, added lustre to her fame, and now sleeps in her soil.

Archibald DeBow Murphey was born in the year 1777 in the county of Caswell, about two miles from the Red House and about seven miles from Milton. Here was the residence of his father, Col. Archibald Murphey, who came from Pennsylvania in 1769, being a son of Alexander Murphey, of York County, who, or whose ancestors, had come from Ireland. Colonel Murphey was the Clerk of the Court, and, upon the invasion of the British Army, closed his office, raised a company, and joined the forces under General Greene. The mother of Judge Murphey was, prior to her marriage, Jane DeBow, a daughter of Solomon DeBow, of the Red House, in Caswell County, who had also come from Pennsylvania in 1750, and his ancestors from Heidelberg or Holland. Of his early education Judge Murphey in his oration at Chapel Hill in 1827 gave this account: "The usefulness of Mr. Caldwell to the literature of North Carolina will never be sufficiently appreciated, but the opportunity of instruction in his school was very limited. There was no library attached to it; his students were supplied with a few of the Greek and Latin classics, Euclid's Elements of Mathematics and Martin's Natural Philosophy. Moral Philosophy was taught from a syllabus of lectures delivered by Dr. Witherspoon at Princeton College. The students had no books on history or miscellaneous literature. There were indeed very few in the State, except in the libraries of lawyers, who lived in the commercial towns. I well remember that, after completing my course under Dr. Caldwell, I spent nearly two years without finding any books to read except some old works on theological subjects. At length I accidentally met with Voltaire's History of Charles the XII, of Sweden, an odd volume of Smollett's Roderick Random, and an abridgment of Don Quixote. These books gave me a taste for reading which I found no opportunity for gratifying until I became a student in this University in 1796."

Governor Graham, in his address, remarks:

"When we consider that he afterwards became capable of writing like Goldsmith, and with an ease and rapidity that Goldsmith could not have equalled, we can but recall these reminiscences of earlier times and encourage the diligent student by his example. With a mind delighted by a consciousness of advancement in knowledge and spirit of emulation, he profited greatly by three years' study in the University, and graduated with the highest distinction in 1799. Such was the reputation acquired by him in this period that he was at once appointed professor of ancient languages in his *alma mater,* a situation in which he continued the three succeeding years, and in which he matured that scholarship and taste for liberal studies, which so much distinguished him among his professional brethren and the educated gentlemen of the State."

On November the 5th, 1801, he was married to Jane Armistead Scott, a daughter of John Scott, and a sister of Mrs. William Kirkland, whose daughter became the wife of Chief Justice Ruffin. He began the practice of law in 1802, his professional studies having been directed by William Duffy, Esq., an eminent lawyer then residing at Hillsboro, and probably Judge Murphey first settled there, though in a short time he has acquired the property known as "The Hermitage" near the confluence of the Haw and Alamance rivers and is gradually adding to the number of acres; and his love of country life is shown in one of his letters: "I delight at this season of the year to ramble through the fields and meadows which begin to clothe themselves with fresh verdure, to walk over the hills and valleys when herbs, shrubs and trees begin to blossom. How beautiful must the Hermitage soon appear and how much more happy must one live in such retirement, in conversing with nature's works, than those who spend their days in the hurry and bustle of the world; who must pass to their graves strangers to that tranquility and serenity of mind which few enjoy, except those who have a taste for the beauties of nature. With what pleasure shall I return to these delightful scenes from the wearisome avocations of professional life."

The competitors he met at the bar at one time or another were strong men, for besides Archibald Henderson, Seawell, Yancey and Morehead of other counties, Cameron, Norwood, Nash, Ruffin and Mangum were residents of Orange, and Hawks and Badger for several years. To show the position he early attained it is only necessary to mention that Chief Justice Ruffin, after two years (1806-1807) of study in the law office of David Robertson in Petersburg, Va., pursued his further studies under the direction of Hon. A. D. Murphey until his admission to the bar in 1808. Of the methods adopted by him in his practice, Governor Graham gives this account: "Both his examination of witnesses and arguments of causes before juries on the Circuit could not be excelled in skillfulness. He had a Quaker-like plainness of aspect, a scrupulous cleanness and neatness in an equally plain attire, an habitual politeness and a subdued simplicity of manner, which at once won his way to the hearts of the juries; while no Greek dialectician had a more ready and refined ingenuity, or was more fertile in every resource of forensic gladiatorship. His manner of speaking was never declamatory, or in any sense boisterous, but in the style of earnest and emphatic conversation, so simple and apparently undesigning, that he seemed to the jury to be but interpreting their own thoughts rather than enunciating his own, yet with a correctness and elegance of diction which no severity of criticism could improve. A pattern of politeness in all his intercourse, public and private, he could torture an unwilling witness into a full exposure of his falsehood and often had him impaled before he was aware of his design; no advocate had at his command more effective raillery, wit and ridicule to mingle with his arguments."

In 1812 Mr. Murphey was elected Senator from the county of Orange (which then embraced the present county, and also Alamance and the larger part of Durham County), and was continued through the succeeding years until, and embracing 1818. During this time Duncan Cameron was a member of the House for 1812-1813, Frederick Nash for the four succeeding years, and Wiley P. Mangum for 1818; and during the years 1813, 1815, and 1816, Thomas Ruffin was elected from the Borough of Hillsboro. A county was fortunate that could send such a Senator and Representatives, each of them going upon the bench of the Superior Court at the end of his term, or shortly thereafter; Ruffin and Nash going eventually to the Supreme Court, and each presiding as Chief Justice, and Mangum to the Senate of the United States, and presiding officer of that body during the administration of Tyler.

During the career of Judge Murphey as Senator he was one of the most popular and influential men in the Legislature, and took a leading part in its deliberations. Both as Senator, and as chairman of committee, and afterwards as a member of the Board of Internal Improvements, he advocated, with great ability, improvement of roads, deepening of rivers, inland waterways for the purpose of making Beaufort and Wilmington points from which produce of the State should be shipped, and import and export trade be built up. In that day railroads had not been contemplated, and even now some of his schemes are still urged upon the general government, particularly those for the deepening of some of our rivers and securing the inland waterways through our sounds, and to the harbor of Beaufort He was the early advocate of a general system of public education and an institution for the deaf and dumb, and by his speeches and reports aroused enthusiasm throughout the State in behalf of his proposed measures, and created a public spirit which bore fruit in after years. In the Legislature of 1818, while he was not successful in the election of judges for the Supreme Court, both he and Frederick Nash were elected judges of the Superior Court, though from the same county, and it has been remarked of him: "Murphey was not long on the Superior Court bench, but while there ranked as high as Ruffin did." The Supreme Court under the new organization began in January, 1819, and the report of their decisions for that year, published in 1821, is by A. D. Murphey, who seems to have held the position of reporter while judge. He afterwards published reports of the decisions of the Court of Conference from 1804 to 1810, inclusive, and from 1811 to 1813, inclusive, and of the July Term of 1818. These reports, 1, 2 and 3 Murphey, are now known as the 5, 6 and 7 N. C. Reports.

The most important case in the decision of which he took part, was at June Term, 1820, when, as stated in *Griffin v. Graham,* 8 N. C. Report, page 69: "Hon. A. D. Murphey, Judge of the Superior Court, presided in several causes instead of Judge Henderson, who had been concerned in them at the bar," and involved a construction of the will of Moses Griffin. The trustees and executors were directed to purchase two acres in the town of New Bern, upon which a brick house was to be erected fit for the accommodation of indigent scholars and to be called "Griffin's Free School," in which were to be taught as "many orphan children of poor and indigent parents, who in the judgment of my trustees are best entitled to the benefit of the donation, as the funds are found to be equal to: to clothe and maintain the indigent scholars as well as school them; and at the age of 14, to bind them out to trades or suitable occupations." The complainants were the heirs and next of kin, who filed a bill against the executors and trustees, praying to have the trust expressed in the will declared void, to which a demurrer was filed. The cause was ably argued by

Gaston in support thereof, and Mordecai and Seawell *contra*. In the opinion of Taylor, Chief Justice, delivered for himself and Murphey, who sat for Judge Henderson, it is said on page 127: "The principal objections to the will are that it tends to produce perpetuity, and that the object of the trusts are vague and indefinite, and that it is discretionary with the executors whether they will fulfill the trusts or not, there is no one to call them to account, and that the property ought to be given to the next of kin and the heirs," and on page 130: "But the objects are distinct, viz., the education of poor children and binding them as apprentices. As all the poor children in that part of the county could not receive the benefit of the fund, a discretion was necessarily confided to the executors to select such as stood most in need of that aid. Without so much discretion as this, no charitable institution could ever have been established; for though it might be possible for a testator to designate existing objects, how could he point out those to be hereafter admitted?" And on page 131: "A perpetuity which the law would decree void must be an estate so settled for private uses, that by the very term of its creation there is no *potestas alienandi* in the owner. There is no such restraint imposed on the executor." And on page 133: "Upon the revolution the political rights and duties of the king devolved upon the people of the State in their sovereign capacity. They by their representatives had a right to deposit the exercise of this power where they pleased, and they have placed it in the hands of the Court of Equity." And, "Where there is a trust and a trustee with some general and specific objects pointed out, or trustees for general or indefinite charities, a court of equity may as a matter of trust take cognizance of it in virtue of its ordinary jurisdiction." Judge Hall in his dissenting opinion, says: "In the case before us the trustees could be converted into a corporation and the property vested in it to be applied as the testator has directed. In that case there could be no objection to it as a perpetuity. Our Court of Equity clothed with all the power which the statute of Elizabeth could give cannot create a corporation." This concurrence of Judge Murphey was in accordance with the report he had made to the General Assembly, in 1817, on the subject of education, in which, speaking of the necessity of education for poor children, he says: "Such has always been, and probably always will be, the allotment of human life that the poor will always form a large portion of every community; and it is the duty of those who manage the affairs of a State to extend relief to this unfortunate part of our species in every way in their power. Providence, in the impartial distribution of its favors, while it has denied to the poor many of the comforts of life, has generally bestowed upon them the blessing of intelligent children. Poverty is the school of genius: it is a school in which the active powers of man are developed and disciplined, and in which that moral courage is acquired which enables them to toil with difficulty, privation and want. From this school generally come forth those men who act the principal part upon the theatre of life; men who impress a character upon the age in which they live. But it is a school which if left to itself runs wild; vice, in all its depraved forms, grows up in it. The State should take this school under her special charge, and, nurturing the genius which there grows in rich luxuriance, give it honorable and profitable direction. Poor children are the peculiar property of the State, and by proper cultivation they will constitute a fund of intellectual and moral worth which will greatly subserve the public interest."

He resigned from the Superior Court at the end of 1820, and while laboring assiduously at the bar, he conceived the purpose of writing the history of his native State, and on 20th July, 1821, writes to General Joseph Graham: "Your letter to Colonel Connor first suggested to me the plan of a work I will execute if I live. It is a work on the history, soil, climate, legislation, civil institutions, literature, etc., of this State. Soon after reading your letter, I turned my attention to the subject in the few hours which I could snatch from business, and was surprised to find what abundant material could with care and diligence be collected—material which, if well disposed, would furnish matter for one of the most interesting works that has been published in this country. We want such a work. We neither know ourselves, nor are we known to others. Such a work well executed would add very much to our standing in the Union, and make our State respectable in our own eyes. Amidst the cares and anxieties which surround me, I cannot cherish a hope that I could do more than merely guide the labors of some man, who would take up the work after me and prosecute it to perfection."

The memoranda of General Graham, prepared in accordance with the urgent request of Mr. Murphey, have furnished the foundation of much that has been written on the events of the revolutionary war in our own State. Upon the application of Judge Murphey by memorial, the General Assembly, at the session of 1826, granted him authority to raise by lottery a sufficient sum for the publication of his contemplated history, the plan of which he set forth in detail. Tradition says such a scheme built the Masonic Lodge in Hillsboro, but it was not successful in publishing the history of North Carolina.

Among the public employments of Judge Murphey, of which Dr. Battle gives a full account, was his mission to the Legislature of Tennessee in 1822 in regard to the escheated land warrants, as a representative of the University, he having been selected by the trustees for this purpose. In the light of the decision in *South Dakota v. North Carolina* this would now be regarded as a controversy between States, and adjudicated before the Supreme Court of the United States, but in those days it was deemed best to make an appeal to the Legislature, and Judge Murphey asked for and obtained permission to address the General Assembly of Tennessee. A hard compromise was effected, and that not complied with, but still something was obtained which in later years amounted to a considerable sum. As his co-worker expressed it, "Judge

Murphey could tell how much feeling is sacrificed, and how much anxiety is suffered by those who are the active agents in procuring any capital measure to be adopted by the Legislature of Tennessee."

In his appeal advocating State aid to the University, of which he was trustee for thirty years, Judge Murphey would almost be considered as describing the conditions which prevail to-day. "When former prejudices have died away, when liberal ideas begin to prevail, when the pride of the State is awakened and an honorable ambition is cherished for her glory, an appeal is made to the patriotism and the generous feeling of the Legislature in favor of an institution, which in all civilized nations has been regarded as the nursery of moral greatness and the palladium of civil liberty. That people who cultivate the arts and sciences with most success acquire a most enviable superiority over others. Learned men by their discoveries and their works give a lasting splendor to national character; and such is the enthusiasm of man that there is not an individual, however humble in life his lot may be, who does not feel proud to belong to a country honored with great men and magnificent institutions."

In 1827 he delivered his celebrated address before the two literary societies of the University, of which a contemporary writer of *The Raleigh Register* testifies that "the debility of his body gave an interest to his appearance. Unassuming, yet easy and insinuating in his address, clear and distinct in his enunciation, perspicuous and elegant in his style, he was sustained through a long and eloquent oration by the admiration and applause of a crowded assembly. None of his audience will soon forget their own emotions, or the glow of sympathy imparted to them, by the orator's beautiful remembrance of his friend and patron, William Duffy." I will only quote its conclusion: "Remember, my young friends, that most of the men who thus far have shed lustre upon our country, had not one-half the opportunities of an education which you have enjoyed. They had to rely upon their industry and genius. Genius delights to toil with difficulties; they discipline its powers and animate its courage; it contemns the honors which can be obtained without labor, and prizes only those which are purchased by noble exertion. Wish not, therefore, for a life of ease; but go forth with stout hearts and determined resolution. As yet you little know what labor and perseverance can effect, nor the exalted pleasures which honorable exertion gives to an ingenuous mind. May God take charge of you; lead you in the ways of uprightness and honor; make you all useful men and ornaments to your country."

A touching picture of how he met disappointment and misfortune is given by Governor Graham: "To the possession of genius in an eminent degree he united some of its infirmities. A sanguine temper, a daring confidence in results, a reliance on the apparent prosperity of the times, involved him in pecuniary obligations, many of them perhaps of a speculative character, which eventuated in disaster and swept away his estate. A little later came an attack of chronic rheumatism from which he suffered much, and was often incapaciated for business during the last half dozen years of his life, but during this season of adversity he struggled with a brave heart against the storms of fate. With a pallid cheek and disabled limbs, he made his appearance in the courts, where his gifted mind occasionally shone out in all its meridian splendor, and when this was not practicable, the hours of pain and misfortune were beguiled, if not solaced, by the pursuit of those noble studies which had been the delight of his leisure in the days of his prosperity."

Judge Murphey departed this life in Hillsboro, then his place of residence, on 3d of February, 1832, at what those who have passed beyond would call the comparatively early age of fifty-five years, and is interred a few feet from and nearly in front of the door of the Presbyterian Church. A handsome monument has been erected to his memory by his great-grandson, Hon. Archibald Murphey Aiken, of Danville, Va., who is the grandson of his daughter Cornelia, who married John Payne Carter in 1821, and by B. G. Worth and Mrs. E. E. Moffitt. His son, Dr. V. Moreau Murphey, moved to Macon, Miss., and has descendants in that State. His third son, Peter Umstead Murphey, was a lieutenant in the United States Navy and in the Confederate States Navy, and was distinguished for gallant conduct in command of the "Selma" in Mobile Bay. He was twice married and left descendants by his first marriage, Mrs. T. O. Chesney, of Macon, Ga., and by the second marriage Mrs. F. A. Hoyt, of New York, and R. C. Murphey, of Virginia. Judge Murphey's fourth son, Alexander Hamilton Murphey, moved West after his father's death, and left a son.

To all of his descendants Judge Murphey has left a priceless heritage, for "a good name is rather to be chosen than great riches," and through all of his trials and tribulations the love and esteem of those who knew him best was not withdrawn, but increased as the shadows gathered around him, and one of them has testified: "I never heard a breath against his integrity. His honor was unspotted." He was indeed one

"Of those immortal dead who live again
In minds made better by their presence."

ADDRESS OF ACCEPTANCE BY CHIEF JUSTICE CLARK.

Chief Justice Clark's address of acceptance was as follows:

The Court has heard with interest the instructive and valuable address of Major Graham.

To Judge Murphey belongs the unique distinction that though never elected or appointed to this bench, he shared in its deliberations, delivered opinions, and belongs on the roll of its members. The honor is ours, not his. The Court could add nothing to his fame. He has reflected honor upon the Court.

The law is a jealous mistress, and fame and success come to a lawyer not without effort, close application, and ability.

Unlike some other professions, a lawyer practices with his peers, among men of his own calling, who are competent to judge his merits and ready to avail themselves of his mistakes. Hence unlike many other professions a fictitious reputation cannot be made at the bar. Judge Murphey stood the test. At one of the ablest bars of the State he early won his place at the front, and held it. He was an able and successful lawyer and a distinguished judge.

But he was something more. He did not narrow to a single calling what was meant for mankind. He took an interest in all that pertained to the welfare of the people of his State. He was the earliest advocate of Internal Improvements. About 1815 he procured the passage of acts authorizing and encouraging the building of a system of canals (it was before the day of railroads), and originated the idea of common schools. Some years later he set on foot a plan for publishing our State and Colonial Records, and set about writing our history. It is a public misfortune that this work was not then executed. The larger part of the historical matter then extant has since perished. Our State was then poor, its people (as compared with the present time) were illiterate, and hence unprogressive. A people must themselves be first educated to the support of progressive measures.

In many respects also he was many years ahead of his age. By his practical assistance to the projected systems of canals, he impoverished himself. But he sowed the seed of ideas, which later had full fruition

> "Far on in summers which he did not see."

Twenty-five years later when the State took up the system of internal improvements and inaugurated a public school system, it was largely due to Murphey's initiative, and it was his ideas that prevailed as to both. And in still later times the growth of historical interest, the publication of our Records, and the establishment of our Historical Commission may all be traced back to him.

No judge who ever sat upon this bench has impressed himself more upon the history of the State or fixed himself more abidingly in the hearts of our people than Judge Murphey. The beautiful capital of our westernmost county bears his name. The whole State cherishes his fame. The Court welcomes his portrait, and orders it placed in an appropriate place on the walls of this chamber.

JUDGE R. W. WINSTON'S ADDRESS

In the Matter of

Presenting to the Supreme Court of North Carolina the portrait of Chief Justice Leonard Henderson.

Presenting the portrait of Chief Justice Leonard Henderson, Judge R. W. Winston spoke as follows:

Mr. Chief Justice and Associate Justices of the Supreme Court of North Carolina:

"When Cellini's statue of Perseus was first exhibited on the Piazza at Florence, it was surrounded for days by an admiring throng, and hundreds of tributary sonnets were placed upon its pedestal." We are assembled to-day in this hall whose walls are adorned with portraits of our State's great jurists, and in the presence of worthy successors to those Judges whose "dignity, wisdom and ability have made North Carolina's proudest possession her courts of justice," to hang in its proper place, between Taylor and Ruffin, a portrait of Chief Justice Henderson. In the name of the living kinsfolk of him, of whom Judge Pearson, in the leading case of *State v. Deal,* 64 N. C., 273, declared, "His powers of reflection exceeded that of any man who ever had a seat on this bench, unless Judge Haywood be considered his equal in this respect," I present to you this portrait of Leonard Henderson, one of the first Justices of this Court upon its organization in its present form in 1818, and Chief Justice of this Court from 1829 to the date of his death in 1833.

The Chief Justice's grandfather was Colonel Samuel Henderson, who was the first high sheriff of Granville County. The Henderson family removed from Hanover County, Virginia, to Granville County, North Carolina, about the year 1740, and here Colonel and afterwards Judge Richard Henderson, son of Samuel Henderson, married Elizabeth Keeling, from which marriage sprang the jurist, Leonard Henderson. A man's education begins, they say, hundreds of years before he is born, and hence it is not difficult to trace to their source certain characteristics of the Chief Justice—his originality, his independence, his rugged personality. How could he have been otherwise? Samuel Henderson, the grandfather, strong and rugged, had executed his writs, subpœnas, and other processes, a-foot through the forest primeval, traversing a territory from Virginia on the north to Johnston on the south, and from the mountains on the west to Northampton on the east. "The father, Richard Henderson, holding the minor office of constable, and fired by a noble ambition, determined to enter the profession of the law." He accordingly read such books as were to be had, and after a short time presented himself for examination to the Chief Justice of the General Court, upon whose certificate of proficiency the Governor would issue a license to practice law. When this stripling of the law made known to the examiner that he had scarce been sorrowing at the feet of Coke and Littleton twenty months, not to mention twenty years, he was rudely advised to go home and not undertake to stand for his license, to which our undaunted young disciple of Themis stated with promptness and spirit that he had come not to ask advice or seek a favor, but to demand a right. It is needless to add that the license was worthily won, in the teeth of the most rigid examination. Subsequently, Colonel Richard Henderson attained the highest honor of the profession under the Royal Government, and after the War of the Revolution and the adoption of the Constitution of the United States, he was elected one of the first three Justices of the Supreme Court of North Carolina. This office he shortly resigned, or refused to accept, the reason being that he had more ambitious schemes afoot. He had undertaken to establish a new colony in the west, and to this end had organized the Transylvania Land Company, which purchased of the Cherokee Indians vast tracts of land in Kentucky and Tennessee. The position of Governor or President of this colony called him from his new honors in North Carolina. This colony progressed so far that it sent delegates to the Continental Congress at Philadelphia, asking to be admitted as the fourteenth State of the Union. Of Colonel Henderson it is said that he was the only private American citizen who had a chaplain of his own. When he went into Kentucky with his expedition he was accompanied by a clergyman of the Church of England, who acted as chaplain of his forces, and opened with prayer Henderson's first Legislature. This good man was shortly afterwards scalped by the Indians, who no doubt found him an easier prey than the heroic president of the company.

Wheeler, in his Reminiscences, gives some interesting facts connected with the life of Colonel Richard Henderson. "On 1 March, 1769," quoting from the record, "at a meeting of the counsel, there being present Governor Tryon, John Rutherford, Benjamin Herron, Lewis DeRossett and Samuel Strudwick, Richard Henderson was appointed assistant Judge, as also Maurice Moore, Esq. Governor Tryon reports that 'Richard Henderson, Esq., is a man of ability, born in Virginia and living in Hillsboro, where he is highly esteemed.'" Colonel Henderson must have led a life of much daring and some adventure. For example, on 21 September, 1770, he wrote Governor Tryon that on that day Herman Husbands, James Hunter, Wm. Butler, Ninnian Bell Hamilton, Jeremiah Fields, Matthew Hamilton, Eli Branson, Peter Craven, John Truitt, Abraham Teed and Samuel Parks, armed with cudgels and cow-hide whips, broke up the Court and attempted to strike the Judge and made him leave the bench. They assaulted and beat John Williams severely, and also Edward Fanning, until he retreated into the store of Messrs. Johnston and Thackston, and demolished Fanning's house. Not only were these beaten, but Thomas Hart and John Ludlow, Clerk of the Crown, and many others were severely whipped. Another entry of date 25 January, 1771, is an order entered by the Regulators that Richard Henderson, who appeared as prosecutor of several charges against Thomas Person, should pay all costs!

Judge Richard Henderson's family consisted of four sons and two daughters. Of these William Henderson was a gallant soldier of the Revolution, Lieutenant-Colonel of the Third South Carolina Regiment, captured at Charleston, exchanged to First South Carolina Regiment, a hero of Eutaw Springs, where he was severely wounded 8 September, 1781. Archibald Henderson, an elder brother of the Chief Justice, was declared by Judge Murphey to be "the most perfect model of a lawyer the bar has ever produced, and he contributed more to give dignity to the profession than any lawyer since the days of General William R. Davie and Alfred Moore." One need not be told that he was the grandfather of John Steele Henderson, of Salisbury. Archibald Henderson was wont to say that he had known many good lawyers, but few good judges, and in true Baconian fashion, proceeded to grade the judicial qualifications in this wise: First of all, good common sense; next, an intimate knowledge of men, particularly of the middle or lower classes—their passions, prejudices and modes of thought; thirdly, good moral character subdued feelings without prejudices and partiality; then, independence and energy of will; and, last of all, legal learning. Mr. Henderson must have been a most loyal party man to cast his vote as a member of Congress for Burr instead of Thomas Jefferson for President of the United States. Most of the Congressmen from our State voted for Mr. Jefferson. Indeed, so strong a Federalist as Marshall was induced by Hamilton to vote for the Republican, Jefferson, rather than for Burr. This is the real secret of the Burr-Hamilton duel, the remark made by Hamilton concerning Burr at the gubernatorial caucus in Albany being but the pretext. Mr. Henderson was buried in Salisbury, and a monument was erected to his memory by the bar of Western North Carolina, this being the only monument ever erected in North Carolina to a member of our bar by his fellows. He was often a member of the General Assembly and a representative of his district in Congress. He left surviving two children, Archibald Henderson, and a daughter, who married Judge Nathaniel Boyden, the family traits being admirably preserved in a grandson, Archibald Henderson Boyden, some-time mayor of Salisbury. Another son of Richard Henderson, and a younger brother of Chief Justice Henderson, was John Lawson Henderson, who often represented the Burrough of Salisbury in the General Assembly, was Comptroller of the State, and Clerk of the Supreme Court, and died in Raleigh in 1834. Still another son was Pleasant Henderson who removed to Cabarrus County.

A bit of romance attaches to the maternal line of the Chief Justice. His mother was Elizabeth Keeling, and she was a daughter of Lord George Keeling, so doughty a defender of the Protestant faith in Ireland that he was expelled from Parliament and fled to the State of Virginia, where after getting together enough money by fishing with improvised nets in the Rappahannock to pay the expenses of his affianced, Miss Bullock, of crossing over from Wales to Virginia, they were happily married and became the parents of Elizabeth, aforesaid, the mother of Chief Justice Henderson. And albeit Elizabeth in time became the first lady of the land, she was so careful and thrifty a housewife that she taught her sons, who were to become law-givers, statesmen and jurists, the gentle art of carding and spinning!

The great Chief Justice was no less fortunate in his friends and neighbors and in the county of his birth than in his ancestry. The county of Granville, bearing the proud name of John Carteret, Earl of Granville, stretching from the everlasting hills on the border well into the cotton belt in the east, was in itself a vast domain. In the hill country, on Nut Bush Creek, a few miles from the waters of the fast flowing Roanoke, was born 6 October, 1772, Leonard Henderson. Hard by his home was Williamsboro, named for Judge John Williams, whose sister Leonard's paternal grandfather had married. And at Williamsboro was Springer College, and Saint John's Church, and the home of John Stark Ravenscroft, first Bishop of North Carolina, and of John Penn, signer of the Declaration of Independence, of Col. Robert Burton, member of the Continental Congress, of John Louis Taylor Sneed, afterwards Chancellor of Tennessee, of Robert Goodloe Harper, of lordly Governor Turner, and a little later of the splendid classical school of Reverend Doctor Alexander Wilson; of William Robards, Treasurer of North Carolina; of William Hill Jordan, mose eloquent of divines; of Patrick Hamilton, grandfather of the accomplished general counsel of the Coast Line, and of the Hargroves, Bullocks, Carringtons, Roysters and Baskervilles, gentle folk possessed of broad acres, troops of slaves and dogs of all degrees. Near the end of the eighteenth century, William Lee Alexander invaded this charmed circle and bore away Elizabeth, sister to Leonard. But we shall forgive him for the gift of a grandson, sturdy scion of sturdy stock, who now sits upon this bench. It may not be uninteresting to note that this section was a close second to Chapel Hill as a suitable site for the location of our University; that at Williamsboro both the Judge and Solicitor resided, and that from the Williams family of Williamsboro, descended Gen. R. F. Hoke, Chief Justice Pearson, John Sharpe Williams, of Mississippi; Richmond P. Hobson, of Alabama; Hoke Smith, of Georgia; Calvin Graves, R. B.

Glenn, the Settles and Dockerys and that great teacher and sweet spirit, Ralph H. Graves. Williamsboro of the eighteenth century was not without its attractions—a well ordered race course—the best in the State—and a generous tavern, for such the hotel was called, modeled after an English coffee house, and presided over by Col. Samuel Henderson. Here judges and lawyers and travelers of all kinds were hospitably entertained. Here George Washington paid a short visit, and from here went forth hunting parties into Virginia and up and down the fast flowing Roanoke. Perhaps the familiar name "The Lick," by which Williamsboro was then called, had reference to the habits of the deer and to the spot where weary travelers, as well as the antlered monarchs of the forest, might gather for refreshment. Often making one of these parties was Pleasant Henderson, a brother to Leonard, who had removed to Cabarrus and married. We are indebted to this man, for from him was lineally descended one who but lately passed from earth, beloved beyond any man of his day, bearing the grand old name of gentleman—Hamilton C. Jones, of Charlotte.

The Henderson home was called "Jonesboro," and the plantation, containing some six hundred acres or more, stretched across Little Island Creek, another tributary of the Roanoke. Across from "Jonesboro" was "Montpelier," the home of Judge Williams, and in the distance was hospitable "Burnside," where the Hamilton's lived, and nearer to the village stood the "Sneed Mansion House," and not far away was "Belvidere," the romantic home of Captain Jack Eaton, and "Nine Oaks," where resided Broomfield Ridley, who married into the Henderson family and moved to Tennessee, becoming the ancestor of judges and doctors of divinity, and in easy reach stood "LaGrange," owned by John Hare, Esq., a friend of the Hendersons. We may pause to remark that it was in this vicinity that an incident in the early life of Edwin G. Reade, then a penniless youth, turned his mind to the law and gave to North Carolina one of its clearest-headed jurists. The home and its environs made an impression upon the life of the future Chief Justice. Even in ruins, says Dr. Kingsbury, Williamsboro is the most antique village to be found. It lacks but another Goldsmith to become another Sweet Auburn of the Plains. There is a ruggedness in the foothills of our mountain system, a serenity in the solemn forests of oak and pine, a spirit of reflection in the fast flowing streams hastening to swell the tide of the Roanoke, on whose banks the red man had but lately pitched his tents and then silently folded them forever, that made of Leonard Henderson a man. Here grew up the boy, occasionally making a visit to his relations in Salisbury, frequently mingling in the society of Hillsboro and Oxford, but always retaining his individuality. His education was confined to the instruction of a local teacher, Rooker by name, introduction to the Greek and Latin Classics by Rev. Mr. Pattillo, a Presbyterian clergyman, the course of learning prescribed at Springer College, and one or two sessions at Salisbury. This preliminary work accomplished, he began the study of law in real earnest, and drank deep from the fountains, guided in his task by Judge John Williams, his relative. In 1795 he married his cousin, Frances Farrar, a niece of Judge Williams, and of this union three sons and two daughters reached maturity and married, to-wit: Archibald Erskine Henderson, Dr. W. F. Henderson and John L. Henderson, Frances who married Dr. W. V. Taylor, and Lucy who married Richard Sneed. Shortly thereafter he was appointed Clerk of the District Court at Hillsboro, where he resided for several years. The State was then divided into a small number of districts, in each of which a court of Supreme jurisdiction was held twice a year, and as each district comprised several counties, the clerkship must have been an office of no little emolument as well as dignity.

"The district system of courts was abolished in 1806, and the present plan by which a Superior Court is held at least twice a year in each county, took its place. The State was divided into six circuits, and a judge was elected for each circuit. The judges were not required to reside in their circuits, and they might ride the circuits to suit themselves, but no judge might ride the same circuit twice in succession. The Supreme Court was held in Raleigh, by the same judges, twice a year, in the intervals of the Superior Court ridings. Two years after the adoption of the Superior Court system, Leonard Henderson was chosen by the General Assembly to fill a vacancy caused by the death of his relative, Judge McCoy, and removed with his family from Hillsboro to Williamsboro. The General Assembly at that time was composed of members of the Republican party, while Judge Henderson was an ardent supporter of Hamilton and Madison. At the same session of the General Assembly, David Stone was chosen Governor of North Carolina, he being at that time a leader of the Republican party. The election of Mr. Henderson in these circumstances was a high tribute to his character and eminent qualifications."

After eight years' service as a judge, upon the meagre salary of $1,600.00 per year, he resigned his office and resumed the practice of his profession at Williamsboro. Judge W. H. Battle assigns as a reason for his resignation, that a man of limited means with an increasing family, could not well afford to perform the arduous duty of riding two circuits, composed of ten counties each, and of assisting to hold two terms of the Supreme Court, for so small a salary. Neither official dignity and repose, nor a just sense of public duty could prevent such a man from returning to a profession whose emoluments might supply the increasing wants of his family.

Soon after his return to Williamsboro, though the exact date is not known, Judge Henderson opened the first law school ever established in the State. If this school had its beginning prior to 1810, it was probably the first law school established in the United States. Judge Henderson is therefore justly entitled to be called the "Father of North Carolina Law Schools." Doubtless it was while students at "Jonesboro" that Richmond Pearson and W. H. Battle dreamed of the day when they too would establish schools of law, modeled after that of Leonard Henderson, and become the idols of their boys and wear the ermine, even as did their beloved preceptor, and "Jonesboro" became the father of Richmond Hill and of the University Law School. Attracted by the fame of Judge Henderson's law school and by the culture and refinement of its surroundings, generous youth from far and near gathered to receive instruction in the law. Among others were, Richmond Pearson, William Horne Battle, Judge Robert Ballard Gilliam, Judge Burton and Governor H. G. Burton.

In an appreciative and faithful sketch of Judge Henderson, by Judge Battle, we are told that he did not deliver regular lectures, nor appoint stated hours for recitations, but directed the studies of his pupils, urging them to apply to him at all times for the solution of their difficulties, and was never better satisfied with them than when by their frequent applications to him for assistance, they showed they were studying with diligence and attention. As an instructor, Judge Henderson was thorough and accurate. While he did not formulate the case-system of instruction, the credit of this great discovery belonging to Prof. Langdell, of Harvard, still, if tradition count for aught, his young students were not ignorant of concrete cases, selected by their teacher from the vast volume of business dispatched by him as a judge. Indeed, Richard Bullock, Esq., the wealthies man in the community, and a justice of the peace, often had his patience taxed to the limit by the enthusiasm of these twigs of the law, as they valiantly flashed their maiden sword in defence of hapless offenders in his court. Is it not after all, the office of a law school to train men to think, to be firm, to be obedient to constituted authority, to frown down upon lawlessness, to create a healthy, clean public sentiment—rather than to give them something practical? In a word, to teach law in the *grand* manner, and to make great lawyers. Was Judge Holmes correct in saying, "It is from within the bar and not from outside that I heard the new gospel that learning is out of date, and that the man for the time is no longer the thinker and the scholar, but the smart man, unincumbered with other artillery than the latest edition of the Digest and the latest revision of the statutes"? If he was, were it not well to abolish the quizzing process? Henderson and Pearson—Gamaliel and Saul—these men would rather their students reasoned correctly, though they gave a wrong answer, than that they reasoned wrong and stumbled upon the right answer.

Judge Henderson was a thorough-going Federalist. He belonged to that class mentioned by Justice Connor in his sketch of Gaston who were apprehensive of the political future of our country under the guidance of Jefferson. He could but anticipate the day "when in the State of New York, a multitude of people, none of whom have had more than half a breakfast, or expects to have more than half a dinner, will choose a legislature, and when on one side a statesman will be preaching patience, respect for vested right, strict observance of public faith—on the other will be a demagogue, vaunting about the tyranny of capitalists and money lenders, and asking why anybody should be permitted to drink champagne and ride in a carriage, while thousands of honest folk are in want of necessaries, and he could but ask himself which of these two was likely to be preferred by a working man who hears his child cry for more bread. And he saw danger and danger only in the teachings of Jefferson, the Idealist, if not the demagogue(!) of Jefferson who was then teaching that "constitutions should not be looked upon with sanctimonious reverence, nor deemed like the ark of the covenant, too sacred to be touched, that laws and institutions should go hand in hand with the advance of the human mind, that the office of judge should be for four or five years, which would bring their conduct at regular periods under revision and probation."

These things were most shocking to the Federalists of that day, and yet it is but a truism that no constitution has ever been written which did not bear the impress of Jefferson's mind, and we of the twentieth century can thank the God of nations equally for Hamilton and Marshall and for Jefferson and Jackson, for Henderson as well as for Macon. The resultant of these contending forces is "The States," time's noblest offspring. We have no fear for our country, nor will capital and labor clash, so long as legislative bodies shall continue to enact laws protecting childhood, shortening hours of labor, creating old age pensions, regulating public service corporations, taxing incomes, and so long as the courts of last resort see to it that coaches and six are not easily driven through these beneficent statutes. One who seeks the formative period of political opinion in America, must look to the State Conventions held at the end of the eighteenth century. The Convention for North Carolina convened in Saint Matthew's Parish Church, Hillsboro, in 1788. There the parties lined up for the battle, and on one side or the other from that day until the war drum sounded in 1861, the people of North Carolina, differing from each other upon the fundamental principles of government, contended as two strong men standing face to face. Samuel Johnson, President of the Convention, and Davie and Iredell, founders of the Federalist party, afterwards becoming the Whig party, opposing, and by a vote of 184 to 84, vanquishing Wiley Jones, Timothy Bloodworth, and other tribunes of the people, leaders of the Republican party, subsequently becoming the Democratic party. These leaders found valiant allies in Nathaniel Macon and the Henderson brothers, respectively. While the victory perched first on one banner and then on another, the Republican-Democratic party, ever keeping close to Jefferson, came into the ascendant, and in 1789 at Fayetteville reversed the action of the Hillsboro Convention. In a few short years, General W. R. Davie, the aristocratic leader, went down in defeat before Willis Alston in a heated contest for Congress. Whereupon General Davie, our erstwhile representative at the Court of Napoleon, became so much disgusted, not only on account of the turn of affairs and of his own defeat, but particularly on account of the manner in which it was brought about, his rough and ready antagonist, Willis Alston, having originated and circulated a most laughable joke which did much to create a sentiment hostile to the General, that he removed to more congenial regions in South Carolina.

The fame of Leonard Henderson rests not mainly upon his capacity as a teacher, but upon his eminent qualifications as a Judge of this Court. His pupil, Judge Battle, states that he was unquestionably a man of genius and in early life had studied with assiduity and success the principles of the common law and had made himself familiar with its grounds and reasons. He was never content until he had thoroughly comprehended whatever he met in the course of his reading. "On one occasion while he was a student, he came upon a passage in Bacon's Abridgement, which he could not understand, and his teacher being from home so that he could not get it explained, he came very near throwing aside his books in despair and abandoning the profession forever. He had an honest as well as strong mind, and in all his arguments we find predominant an anxious search after truth. For this reason he was restive when he found himself opposed by precedents which he thought were unsupported by principle. Whatever fault he had as a Judge was owing to this disposition, but notwithstanding that, he must always be regarded as standing high among those who before and after him have adorned the Supreme Court bench of North Carolina." His services as a Supreme Court Judge embraced a period of fifteen years and his opinions may be found reported in the 4 to the 17 N. C., inclusive.

In 1825 an interesting question arising out of the doctrine of warranty, was presented to this Court in the case of *Taylor v. Shuford,* 11 N. C., 129. Mr. Badger, with his usual force and clearness, had contended that a deed without covenants of warranty would not pass an after acquired estate to the original grantee, his argument being that conveyances which operate without transmutation of possession, as releases, grants of incorporeal hereditaments and deeds which owe their operation to the statute of uses, have no such effect of themselves and that they pass only what the grantor hath and if he hath nothing they pass nothing. Mr. Badger further contended that if the grantor afterwards acquires title, it inures to himself and not to the grantee. But, if warranty be added to such conveyance, then by force of the warranty and not of the conveyance, the grantor is estopped and title subsequently acquired shall inure to the benefit of the grantee. The inference is conclusive from those cases that no grant, release or deed operating under the statute of uses creates any bar except by force of an express warranty annexed to it. With this technical, though cogent reasoning of Mr. Badger, Chief Justice Henderson took issue with some tartness, as the opinion will show, and in his usual direct fashion, thus: "If A sells to B by indenture, he thereby affirms that he has title when he makes his deed, and if he had not and afterwards acquired one, in an action by him against B, the title of the latter prevails, not because A passed to him any title by his deed, for he had none then to pass, but because A is precluded from showing the fact." A vast amount of learning has been exhausted upon this abstruse question, as may be seen by reference to Prof. Mordecai's instructive and suggestive Law Lectures, title "Estoppel by Warranty." It must be highly gratifying to the descendants of Chief Justice Henderson that his decision in

Taylor v. Shuford was finally adopted by the Supreme Court of the United States in *Van Ranselar v. Kearney,* 11 Howard, U. S., 298.

Judge Henderson's style, as shown in his reported opinions, was clear, crisp and aphoristic. Thus after deciding that the right of trial by jury must be sacredly preserved and that an act of the Legislature which simply *permits* an appeal is not a compliance with the constitutional guarantee of trial by jury, and after construing the word "ought" to mean "must," and to be imperative, he concludes: "It is sufficient for the creature to know the will of the creator. Obedience is then a duty without an express command." In arguing this appeal, Potter, on behalf of the appellant, declared that "it was enough for his purpose to say that if he had shown that the acts giving jurisdiction are unconstitutional, any proviso saving the right of appeal, cannot make them constitutional." All of which is respectfully submitted for the consideration of the newly discovered Recorder's Courts. So again in *Britton v. Israel,* 10 N. C., 225, Judge Henderson boldly declares that even where there is an express warranty of soundness, if the unsoundness be apparent, and, therefore, must have been known to the purchaser, no action shall lie.

As was said by Judge Battle in his Memoir of Chief Justice Henderson in the University Magazine for November, 1859, the first three Judges of our Supreme Court, Hall, Henderson and Taylor, were especially desirous to settle for North Carolina a system of law founded upon the common law of England, modified, indeed, to some extent, to suit the peculiar nature of our institutions and altered in many respects by legislative enactment. In this attempt they were greatly aided by the argument of a bar which had no superior, and hardly an equal, in any State of the Union. The truth of this will readily be acknowledged by those who read the names of Archibald Henderson, William Gaston, Thomas

Ruffin, Moses Mordecai, Gavin Hogg, Peter Brown, Joseph Wilson and Henry Seawell. Some of these were succeeded a few years later by Duncan Cameron, Francis L. Hawks, George E. Badger, Thomas P. Devereux, Frederic Nash, Samuel Hillman, William H. Haywood, Patrick Henry Winston, of Anson, and James Iredell. To be Chief Justice of this Court and to be worthy of the position—what honor in the gift of the people approaches it—what opportunity for good equals it? Taylor, Henderson, Ruffin, Nash, Pearson, Smith, Merrimon, Shepherd, Faircloth, Furches, Clark, *nomina venerabiles et clarissima.*

It is said that on one occasion Bishop Ravenscroft attempted to reprove the Judge because of his religious or want of religious views, whereupon the Judge retorted, "It were well for you to have your horse hitched before you crack your whip." Unfortunate for the religion of a hundred years ago, its doctrine was proven orthodox by apostolic blows and knocks, and the ecclesiastics persisted in Churching such men as Thomas Jefferson, who were by no means scoffers or unbelievers, but earnest seekers after truth, and who today would be worshipping at the same altar with Chas. W. Eliot, Edward Everett Hale and William H. Taft. Religious tolerance did not characterize an age taught by blind mouths whose lean and flashy songs grate upon their scrannel pipes of wretched straw, an age which disfranchised Catholics and forbade Hebrews owning real estate—and yet it was such an age that pronounced the boldness of the Chief Justice to be skepticism. A Christian poet had not then sung—

"There lives more faith in honest doubt,
Believe me, than in half the creeds"—

Nor had we learned that if the normal man is let alone, to him the Heavens will declare the glory of God and the firmament show His handiwork. Such a man will finally come, like Napoleon, to declare, "I know men, and Jesus Christ was no mere man," or like Webster to exclaim, "No man can read the Sermon on the Mount and be an infidel." Whatever in youth Henderson believed or disbelieved, he finally became a constant worshipper at and communicant of old Saint John's Church, and his pew may now be seen by the curious pilgrim to this ancient shrine.

Judge Henderson was a large man physically. He weighed 212 pounds and was more than six feet in height. His hair was dark and profuse and well roached back from his forehead. His eyes were large and gray and in repose appeared rather heavy, says Dr. Kingsbury, seeming to be "in-taking rather than giving out." His head was large, strikingly symmetrical, with forehead high, broad and exquisitely chiseled. Like all the Hendersons of his day, he had a remarkable length of chin, and his mouth was fixed well back in his head. This gave occasion to a witty Rowan farmer to remark when the Judge presided the first time in Salisbury, that he thought Baldy Henderson's mouth was far enough back in his head, but the Judge had swallowed his. When the fiery Bishop Ravenscroft removed to Williamsboro, Judge Henderson did not call as soon as he might and the stern Bishop, who was preparing his hebdomadal homily, made no further recognition of the belated visit than a turn of the head, at once resuming his task. The Judge withdrew and told his boys at the law school that he had been treated right for his discourtesy.

Judge Battle represents Judge Henderson as kind, affable and courteous, in domestic and social life. He possessed in no ordinary degree the love of his wife and children, and there was no man whose intercourse with his family was better calculated to win their confidence and affection. To this day his memory is held in tender affection by his descendants, one of whom, now serving his State in the legislative halls, and but yesterday in the roar of battle burying a leg upon the red hills of Virginia, will, like Gunga Din, "dot and carry one till the longest day is done," and another, mingling the blood of Henderson and Scales, respected by the whole State, has but entered upon his career. Judge Henderson was a delight to his friends, and his fine conversational powers, aided by a strong and energetic expression, always drew around him a circle of admiring listeners. With the people of the State he was always a favorite. No better illustration of this could be furnished than his election on the first ballot by the Legislature, together with a personal friend but political opponent, over four other gentlemen of great name and extensive influence in the State, Taylor, Seawell, Murphy and Yancey. He filled no other offices than that of the Clerk of the District Court at Hillsboro, Trustee of the University of North Carolina and Judge of the Superior and Supreme Courts. One county and three cities in this and other States bear the name of Henderson, such an impression did this virile family make upon mankind.

On 13 August, 1833, the spirit of the Chief Justice passed to its reward. For him his contemporaries manifested both veneration and affection. A meeting of the Bar, at which Adolphus Erwin presided and Burgess S. Gaither was secretary, was held in August, 1833, at Asheville, and after adopting the usual preamble, the resolutions draughted by Samuel Hillman, Esq., declared of the late Chief Justice that his life and character had been identified with the legal history of North Carolina, his urbanity of manners, dignity of deportment, unspeakable honesty, unshaken independence and vigilant regard for every class of suitors, have maintained the universal respect and esteem of the profession, and his genius and talents have contributed much to erect a regular system of law and equity, adapted to our peculiar conditions, interests and institutions. A meeting of the Granville Bar was presided over by Judge J. R. Donnell and Hugh Waddell acted as secretary. The resolutions declared that "the judicial office in the government of laws is that in which the community have the profoundest interest, for in addition to the moral and intellectual elevation of him who fills it, is the respect felt for the laws themselves, and all good men deplore as a public calamity that such an office should ever be feebly filled, as to the mass of mankind the step is easy from a contempt for the organ to a contempt for law itself. As a Judge, the deceased was of inestimable value to North Carolina. The genius, the learning, the firmness which characterized him, insured the faithful execution of the laws and commanded the universal confidence of the public." Judge Ruffin was making preparation to visit Chief Justice Henderson at Williamsboro when news of the latter's death was announced. At once, he hastened to Raleigh, and from the capital on 21 August, 1833, wrote to John L. Henderson, a son of the Chief Justice:

"There is a vacuum here which none can fill. Time (what cannot time do of good as well as of evil) will, I trust alleviate the pangs of sorrow I now experience, and sweeten the chalice which he has so lately embittered to you. Your father is gone now, but let his works live after him. Forget not his virtues, his purity of heart, his benevolence, his powerful and profound intellect, but while they are yet fresh in your mind, let all that he said or did be carefully and frequently thought of so that the impression on your own mind may be permanent, and you thereby keep him constantly by you as a counselor and guide."

The entire letter should be published as a model not only of elegance of diction, but of the love which bound together the two great Chief Justices, Ruffin and Henderson.

When the spirit of Daniel Webster was passing from earth, he signified his wish to be rolled upon his couch to the window that he might look for the last time upon the beautiful scenes surrounding "Marshfield," his country home, and that he might gaze once again into the honest eyes of his oxen which were driven near the bedside. When the spirit of the Chief Justice was passing from earth, 13 August, 1833, he requested his friends to permit him to gaze for the last time upon the scenes of his childhood, loved Montpelier, and the last words which he uttered, were these: "I have passed the portals and see nothing terrifying."

Such was Leonard Henderson, racy of the soil of North Carolina, bluff, honest, despising shams, thinking what he had a mind to and saying what he thought, worthy of his great name, a beacon light to guide you, Sirs, and me, and all generations to come, and an admonition to little men that hypocrisy and self-seeking and sycophancy and concealing one's honest opinions, are lies, hurtful not alone to the State but more hurtful to the man himself. With Mansfield he could say, "I wish popularity, but it is that popularity which follows, not that which is run after. It is that popularity which sooner or later never fails to do justice to the pursuit of noble ends by noble means."

Address of Acceptance by Chief Justice Clark.

Time tries all things. Well has the memory and fame of Chief Justice Henderson stood this stern test. More than three-fourths of a century have now gone since he passed from his seat on this bench, but his place in the opinion of the bar and people of North Carolina has in no wise abated from that given him when his loss was still fresh and when the spell of his personal magnetism and personal friendships still lingered. A beautiful county and two towns bear his name—an honor North Carolina has conferred on no other member of this bench save the loved and lamented Gaston.

Alone among the nations of the world, and alone in all the tide of time, England and the peoples that speak her tongue have adopted the system of precedents by which the opinions of a Judge or a Court are considered ever after as authority (unless overruled) in other courts, upon the same or a more or less similar state of facts. In all other countries, and in all other times, the law of a case has been governed by statute and when that was lacking, the opinion of the court which tries a case has been considered as sound, and as likely to be right, as that of a former Court in a litigation between other parties. Priority of time is not considered as superiority of wisdom. Whatever the merits of the two systems, ours gives signs of breaking down. The immense increase in the number of volumes of reported cases has long ago placed a complete collection of the whole body of the law beyond the purse and beyond the time and capacity for research of the practitioner and taxes the means of State and city libraries. Encyclopedias and other compilations are unsatisfactory palliatives constantly requiring additions and further condensations. Amid such an enormous and growing tide of judicial utterances, from courts and judges of every degree of capacity and learning, there is already a hopeless conflict of decisions and with a little diligence an array of precedents can be culled to sustain either side of almost every proposition.

It would be a palpable absurdity for any court to merely count the number of cases on either side and award the result to counsel whose diligence can unearth the larger number of precedents, without reference to their value, based upon their reasoning and the reputation of the court or judge from whose pen they come. In this situation, the courts are driven more and more to rely rather upon the opinion of the great leaders among the judges of known ability and clearness of view. In North Carolina, the bar and bench have thus always turned to the opinions of Chief Justice Henderson, with entire confidence, that when he has discussed a subject there is little that can be added and in full reliance upon the accuracy of the result that he has reached. Thus time and the process of events have added to and not diminished his value and fame.

The descendants of Chief Justice Henderson—lineal and collateral—have themselves rendered notable services to the State and have added to the ancestral honors descended upon them. The Court is glad to receive at their hands this portrait of the great lawyer and the great judge. The Marshal will hang it in its appropriate place upon the walls of this chamber by the side of his great compeers. The valuable, instructive and interesting address of Judge Winston in presenting the portrait will be printed in the next volume of our reports.

REMARKS OF MR. EDWARD J. HALE

In the Matter of

Presenting to the Supreme Court of North Carolina the portrait of Judge J. D. Toomer.

Mr. Chief Justice and Associate Justices, Most Honorable Sirs:

By your authority, I have the privilege of presenting to you a portrait of a distinguished North Carolinian, once a member of this great Court, and, by your invitation, to speak some brief words concerning him.

There is a sketch of Judge Toomer's life in "The Green Bag," which I believe is the literary organ of the bar in America, written by the present Chief Justice in 1892, which describes in the finished and forcible style for which its author is distinguished, the career of Judge Toomer, from the viewpoint of one of his professional brethren. If it be the practice to make record of proceedings of the kind now taking place, I ask that Judge Clark's sketch of Judge Toomer may be made a part of the record.

Assuming that my request is not repugnant to usage and that it will be granted because consonant with your own sentiments, I shall briefly recite the salient features of Judge Toomer's life and public services as they occur to a layman, bound to him as I am by the ties of inherited affection and esteem.

John Duncan Toomer was born in Wilmington 13 March, 1784. He was the son of Henry Toomer, and his wife Magdalen Mary DeRossett. The name is Welsh, and his father was descended from one of the companions of Sir John Yeamans, in the Cape Fear Settlement of the Clarendon Colony, who accompanied Yeamans when he went to Charleston as Governor of Carolina. There his grandfather Joshua Toomer was born 12 September, 1712; there also his father Henry Toomer was born 7 August, 1738. Henry Toomer was married thrice—first to Mary Vanderhorst, of Charleston; next to Mary Grainge; and then to Miss DeRossett, of Wilmington, who was the mother of Judge Toomer, as I have said.

The family of Toomer, including Joshua, Anthony, and Anthony Bonneau, who was prominent in the social and political annals of South Carolina before the Revolution, and the intercourse between the Charleston part of old Clarendon and the lower Cape Fear part lead to many intermarriages between the prominent families in them. The older branch of the Rhetts, of South Carolina, were connected with these Toomers in many ways, and the name frequently crops out in studying their pedigree. I believe that Judge Toomer was descended from them, as was the fact in the case of his wife; but while the family pedigree in my possession shows the latter, that of the Toomers has not followed out the mother lines so completely. It is perhaps worth noting that the name Rhett became extinct in one, at least, of its lines, about the time of the maternal grandfather of our Governor Benjamin Smith. Governor Smith was the son of Thomas Smith and Sarah Moore, daughter of Roger Moore and Katherine Rhett. Governor Smith's brother, James, moved to South Carolina and assumed, under the law, the family name of his grandmother, Catherine Rhett. From him the post-Revolutionary Rhetts of South Carolina were descended.

Judge Toomer's wife was Marie Rhett Swann, daughter of John Swann, of the Rocky Point Settlement on the northeast Cape Fear, famed in Colonial and latter days for its culture and refinement, probably unequaled in America, and for the splendor of its hospitality. She was the lineal descendant of Sir John Yeamans, or, as he is described in the Moore family pedigree, "Sir John Yeamans, Baron and Governor of Carolina." Yeamans' successor as Governor of Carolina was James Moore, who married his daughter Margaret. From the latter's sons, Maurice, Roger and Nathaniel, a number of the distinguished families of the lower Cape Fear were descended. Judge Toomer's wife was descended from Maurice Moore. Their children were: Henry, a planter of Georgia, who died unmarried; Sarah, who married Albert Torrence, of Fayetteville; Mary Ivey, who married Warren Winslow; John, who died in youth; Eliza Yeamans, who married Thomas Hill, of Hailbron; Duncan Alexander, who married Betsey Swann; Lucy, who married Frederick Swann Davis; Catherine DeRossett, who married Nathaniel Moore Hill, and Frederick Armand, a planter of Georgia, who died unmarried. Thomas Hill and Nathaniel M. Hill were descendants of Yeamans through his grandson, Nathaniel Moore.

Judge Toomer was educated at the University of North Carolina; was a trustee thereof from 1818 to his death in 1856, and was a member of the committee, 1833, James Iredell, chairman, which reported against removal of the University to Raleigh. He studied law under Judge Joshua G. Wright, of Wilmington. In 1817 he moved to Fayetteville. In 1818 he was elected a Judge of the Superior Court, but resigned that office in 1819. In June, 1829, he was appointed by Governor Owen as Associate Justice of the Supreme Court on the death of Chief Justice Taylor, but he was not elected by the Legislature when it met in December. He was Senator from Cumberland in 1831, and again in 1832. In 1836 he was again elected a Judge of the Superior Court, which office, from ill health, he resigned in 1840. He moved to Pittsboro shortly before his retiring from the bench, and lived there, at his country-seat, in ease and dignity during the remainder of his life.

Wheeler said (1851) in his account of Judge Toomer's career: "He is considered a most eloquent speaker, and agreeable and interesting writer, of profound literary attainments, and an amiable and urbane gentleman."

Mr. Belden, in his "Reminiscences of Fayetteville" (1893) speaking of Judge Toomer's address of welcome to Lafayette (1825), said: "He was then in the autumn of life, but still sustained the reputation he has always had of being the most eloquent orator Fayetteville has ever had." His address, which was published in full in the *Fayetteville Observer* 10 March, 1825, is a model of eloquence appropriate to the occasion.

The late Edward J. Hale, in his editorial obituary in the *Observer* 2 October, 1856, said:

"We have known Judge Toomer intimately for nearly thirty years past, and we can truly say that a more courteous and dignified gentleman, a more entertaining conversationalist, a more upright and conscientious man, a truer friend, we never knew. He has passed through life without a spot upon his bright escutcheon. He has gone to the grave in a ripe old age, mourned by thousands to whom in the course of a long career of professional labor, his manly form and eloquent voice had become familiar. He was emphatically an Old School Gentleman—a link between the past and present—whose very presence in the Court room inspired a kindly and courteous feeling among his brethren. Before him impertinence shrunk abashed, and the bitterness of professional zeal was calmed into courtesy. The quiet influence thus exercised by him made him a universal favorite, and to the cordiality with which he was everywhere received was it owing, we doubt not, that he continued his circuit for some years after his health would have justified retirement, and long after the necessity of exertion for the sake of its emoluments had ceased. He was both a learned lawyer and an eloquent advocate. Earnest and indefatigable, he was always fair; but it was less in his professional than in his social life that we knew him; and we will leave some professional pen to speak more particularly as to that. Among the first graduates of the University of North Carolina, he was one who profited by the education he there received, and he continued a student for the love of literature and law, to the day of his death. A remarkably tenacious memory had enabled him to retain not only his classical and legal reading, but to gather many anecdotes of remarkable men and things which had come under his observation in the course of an extensive practice, and these he was wont to relate to his friends with most impressive eloquence. We have often regretted that his arduous labors left him no time to commit to writting these observations and experiences of a long and active life. They would have formed valuable, and altogether reliable contributions to History and Biography. * * * The profession mourns its venerable Head; and the State a citizen without fear and without reproach."

Elsewhere, in the same article, Mr. Hale said: "Office sought him—he never sought office."

The late Governor Winslow, in the same issue of the *Observer,* said: "He was the last connecting link between the lawyers of this and the early age of the Republic. He pursued his studies with Wright, of Wilmington; was the friend and youthful associate of Jocelyn, and had known Hooper and the eminent men of that day. When we first knew the Bar of Fayetteville, its entire business was in the hands of Toomer, and Strange, and Eccles and Henry. They leave behind them to the aspiring youth of the profession examples for imitation."

It will be noticed that both Mr. Hale and Mr. Winslow speak of Judge Toomer as the connecting link between the public men of that day and of the early age of the Republic. I have dwelt somewhat at length upon Judge Toomer's ancestry and social environment for the purpose of illustrating this circumstance. He had been taught that men of his kind should not seek office, but that nevertheless they owed the

State service when called upon, like the youths of Oxford and Cambridge, who officered so gallantly the raw levies which joined Wellington at Brussels. The late Mr. Nathan A. Stedman, sometime Comptroller of North Carolina, said that it was in vain that Judge Toomer's friends appealed to him on the assembling of the Legislature in 1829, to make some sign that he desired to be continued in office; and that it was due entirely to this attitude on his part, which some of the legislators regarded as out of keeping with the spirit of the age, that his appointment six months before by Governor Owen was not followed by election at the hands of the Legislature.

The state of mind of Judge Toomer and his congeners on the subject of seeking office is little comprehended in the present day, when the evolution of Democracy has rendered it important to the public welfare that good men should seek office, within reasonable limits, lest the grade of its incumbents should be lowered. Not far back of Judge Toomer, in our own land, were appointments to judicial position by the Crown; in his day, election by the people's representatives in the Legislature, but for life; later, as with us, election by the people and for a limited number of years.

I have spoken of Judge Toomer's remarkable gifts of eloquence. His speech in the State Senate, 8 December, 1831, upon the bill for appointing Commissioners for rebuilding the capitol at Raleigh and appropriating $30,000 therefor, exhibits him as an orator and cogent reasoner of the first rank. The question of holding a convention was involved, and a quotation from this speech will show what a progressive Republican he was, notwithstanding his inherited views on the subject of office-seeking. Answering Judge Seawell's contentions, he said:

"Why should we fear to trust the people in Convention, or more correctly, why should the people fear to trust themselves? All power emanates from them; the basis of our government is their virtue and intelligence. This position is now deemed as impregnable, in the political, as the fortress of Gibraltar in the military world. The doctrine has been long since exploded that 'the people are their own worst enemies.' We are not required to make an untried experiment; our people have been three times assembled in convention, and on each occasion to the advancement of the general good. Almost all the old thirteen States of the Union have had conventions to revise and amend their Constitutions, and their labors have advanced the commonwealth. Recently have Massachusetts, New York, South Carolina and Virginia been engaged in the business of revising their organic law. Why should *our people* more dread the hand of reform than their neighbors? Why should we fear to trust them with the work of reformation? Patriotism is unwilling to admit that we have not confidence in their virtue and intelligence."

Judge Toomer was averse to having his picture taken—no doubt the result of his extreme modesty. The portrait which is before us was copied from a faded daguerreotype, the only likeness extant. Though it is the best that could be made, it fails to do him justice; for he was a very handsome and noble looking man, as I remember him. It is the gift of Mrs. Haslam and Mrs. H. R. Horne, daughters of Governor Winslow and granddaughters of Judge Toomer.

Mr. Chief Justice and Associate Justices, I now present to you the portrait of one of your predecessors on this bench, who was not the least worthy of honor of those whose pictures adorn your walls.

Address of Acceptance by Chief Justice Clark.

We are gratified to place the portrait of Judge Toomer on these walls by the side of his associates on this bench. He lived an honorable and useful life. His influence, his example and his labors were for the betterment of society and for the good of the State.

"He bore without abuse
The grand old name of gentleman."

He served on the Superior Court with distinction both before and after his service here. Though his term on this Court was brief, it was long enough to show his eminent fitness for its duties. His State and this Court will ever recall his memory with pride. His opinions on the law side will be found in 13 N. C., and in Equity cases in 16 N. C.

The Marshal will hang the portrait in its appropriate place.

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ADVERSE POSSESSION.

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2. *Deeds and Conveyances—Grantor in Possession—Subsequent Deed.*—A grantor in a deed may afterwards acquire title to the land therein conveyed by purchase or adverse possession, good against his grantee and those claiming under him. *Chatham v. Lansford*, 363.
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4. *Same—Entry and Ouster—Estoppel.*—Every entry on land is presumed to be under such title as the party thus in possession holds; and when a grantor in a warranty deed remains in possession of lands, afterwards purchases the same from a third person, takes deed therefor to himself, and claims the right of possession thereunder, the fact of his thus taking the deed amounts to an entry and ouster, and he is not estopped from asserting title by adverse possession because of the covenant of warranty in his deed. *Ibid.*

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APPEAL AND ERROR.

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APPEAL AND ERROR—*Continued.*

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9. *Judge's Charge Assumed to be Correct.*—When it is stated in the record that the Court called the jury's attention to a matter, or had instructed upon it, the charge thereon is assumed to be correct on appeal, when it is not set out in the case. *Davis v. Stephenson*, 113.

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11. *Issues, New Trial as to Some—Discretion of Supreme Court.*—It is within the discretion of the Supreme Court to grant a new trial upon one or more issues, and let the others stand, when it clearly appears that the matters involved are entirely separate and distinct from the matters involved in the other issues, and that a new trial can be had without danger of complications with other matters; especially so when both sides appeal in an action for damages for personal injuries sustained, and error is found only in the plaintiff's appeal upon the measure of damages. *Rushing v. R. R.*, 161.

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17. *Evidence — Nonsuit — Trial — Per Curiam Not to Prejudice Rights.*—In this case, the Court held that there was sufficient evidence to go to the jury, and that a judgment as of nonsuit, upon the evidence, should not have been allowed. The evidence was not discussed, as such might prejudice one or the other of the parties to the litigation upon the new trial granted. *Cooper v. Rowland*, 353.

18. *Habeas Corpus Proceedings — Summary Effect — State's Appeal.*—The State has no right of appeal from an order releasing a prisoner in *habeas corpus* proceedings, as such proceedings must necessarily be summary to be useful and give the beneficial results intended. *In re Williams*, 436.

19. *Defenses — Pleas Withdrawn — Discretion.*—When the defendant in a criminal action has entered the plea of "not guilty," and subsequently desires to withdraw it and enter the plea of "insanity," and no ground was laid by affidavit or otherwise to show that defendant was insane at the time the plea was entered or at the time of trial, it is within the sound discretion of the trial Judge to refuse the withdrawal of the plea, and his action is not reviewable on appeal. *State v. Khoury*, 454.

20. *Same—Witnesses.*—It is competent for the trial Judge, in determining whether he will allow a plea of "not guilty," formerly entered, to be withdrawn and the plea of "insanity" entered in its stead, to permit witnesses, who had seen defendant and had an opportunity to form an opinion as to his mental condition, to express their opinion thereon. *Ibid.*

21. *Larceny—Value of Goods—Burden of Proof—Term of Sentence.*—When there is no evidence appearing in the record of

APPEAL AND ERROR—*Continued.*

the value of goods stolen by defendant, but it appears that they consisted of eighteen hams, eleven shoulders and eight sides of meat, he cannot successfully contend that a maximum sentence of twelve months' imprisonment could not be imposed, for it is incumbent on him to prove the value in diminution of the sentence. *State v. Dixon*, 460.

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25. *Same.*—The object of a bill of particulars is to enable the defendant to properly prepare his defense in cases where the bill of indictment, though correct in form and sufficient to apprise the defendant in general terms of the accusation against him, is yet so indefinte in its statements as to the particular charge or occurrence referred to, that it does not afford defendant a fair opportunity to procure his witnesses or prepare his defense. When it appears that the trial Judge has, in his discretion, accepted a bill of particulars as being sufficient under an order theretofore granted at the instance of defendant, and that upon a former trial of the same cause the State's witnesses were examined and information so fully given as to render a further bill of particulars unnecessary, the discretion exercised by the trial Judge will not be reviewed on appeal. *Ibid.*

26. *Jurors, Right of Accused to Reject.*—The right of an accused, in a criminal action, is to reject, and not to select the jurors, and the act of a trial Judge in standing a juror aside is not reviewable on appeal, though he should give an erroneous legal reason therefor. *State v. Peterson*, 533.

APPEAL AND ERROR—*Continued.*

27. *Witnesses, Improperly Sworn—Exception, When Taken.*—An exception that witnesses were not properly sworn, when no objection was made at the time, and none entered to their examination, cannot be entertained on appeal. *Ibid.*

28. *Prejudice—Presumption.*—When the offense charged is bailable and the trial Judge orders the prisoner, who was then under bail, into custody in the absence of the jury, and afterwards offers to release the prisoner on bail, without reference to the matter in the presence of the jury, the inference is that the Judge considered the bond insufficient, and the presumption is that no error was committed. *State v. Lance*, 551.

29. *Evidence — Instructions as to Admissions — Objections.*—An assignment of error to the charge of the trial Judge, in stating an admission of fact, will not be considered on appeal, as such matters are for him to settle; and if no such admission was made, objection should be made at the time so that he may correct the error. *Ibid.*

30. *Indictment — Judgment, Erroneously Entered — New Trial — Solicitor's Discretion.*—Should a new trial be awarded upon appeal by the State from a judgment of not guilty, erroneously entered by the trial Judge, because the evidence did not correspond with the indictment, the question of adding another count to the bill, or sending in a new bill, is one for the solicitor alone. *State v. Branner*, 560.

31. *Criminal Offense—Erroneous Judgment—Prisoner Discharged.*—The State has no right of appeal from the action of the trial Judge in striking out a plea of guilty and entering erroneously a plea of not guilty and discharging prisoner, upon a trial for an indictable offense, as no jurisdiction thereof is given the Supreme Court by the statute. Revisal, sec. 3276. *Ibid.*

32. *Instructions—Stating Contentions.*—An exception that the trial Judge narrated facts not found in the evidence is untenable, when it appears that he was stating the contention of a party to the suit supported by the evidence. *State v. Cloninger*, 567.

ARBITRATION.

1. *Appointment of Third Arbitrator—Notice to Parties—Hearing—Invalid Award.*—When parties submit a matter in controversy to the decision of two arbitrators, with power, in case of disagreement, to call in a third arbitrator, they must, in the absence of an agreement to the contrary, be notified of the appointment of the third arbitrator, the time and place of meeting to determine the controversy, with an opportunity

ARBITRATION—*Continued.*

to introduce their evidence and submit arguments as in the original hearing, and failure to give such notice and hear the testimony will invalidate the award at the instance of either party to the controversy. *Bray v. Staples*, 89.

2. *Same—Instructions.*—It appearing from the uncontradicted evidence that no notice was given of the selection of the third arbitrator, and that he heard no evidence or argument otherwise than as repeated to him by the original arbitrators, his Honor correctly instructed the jury to answer the issue setting aside the award. *Ibid.*

3. *Same—Payment.*—In this case, the part payment made by the original receiver, did not validate the award or prevent his successor from having it set aside. *Ibid.*

ARGUMENT OF COUNSEL. See Power of Court, 10; Instructions, 27.

ASSAULT.

Secret Assault—Circumstantial Evidence—Sufficient.—Upon trial under indictment for secret assault against two defendants, judgment was rendered against both, one of them appealed. There was evidence tending to show that assault was made upon witness and two sons, and that one of the defendants, appellant's brother, was one of them; that a pistol ball, 38 calibre, was taken thereafter from witness's arm, and that a large number of No. 12 shotgun shells, and four or five No. 38 empty pistol shells, were found in the yard where the assault was made; that appellant had that evening bought several boxes of shotgun shells, No. 12, and was seen with the other defendant, who was armed with a 38-calibre pistol, about three hours before the occurrence, within time for them to have been present; that one of the occupants of the room had previously reported a blockade still of the appellant's brother, who was admitted to have been present. *Held*, the evidence, taken collectively, was sufficient to sustain the finding of the jury. *State v. Walker*, 527.

ASSESSMENTS. See Municipal Corporations, 11.

ASSIGNMENT OF ERROR. See Appeal and Error, 8.

ASSUMPTION OF RISK. See Contributory Negligence, 4.

ATTORNEY AND CLIENT.

Partnership—Principal and Agent—Notice to Produce Letters.—Defendant informed a credit agency in reply to its request, by letter, that he was a member of a certain firm. The

ATTORNEY AND CLIENT—*Continued.*

agency, by its general methods, informed its patrons, and one of them advanced credit to the firm upon the faith of the defendant's being a partner. Thereafter, defendant notified the agency by letter, of which no copy was made, that his former letter was erroneous and that he was not one of the firm. The patron of the agency sued defendant to recover for goods sold and delivered. Notice to produce the second letter was given in ample time, before trial, to the attorney of plaintiff and to a local branch of the agency. *Held*, (1) Parol evidence of the contents of the letter was admissible upon failure of plaintiffs to produce letter; (2) The credit agency was the agent of the principal, and notice to the principal's attorney was sufficient; (3) The reply to notice to the local branch that all correspondence had been sent to an office of the credit agency beyond the State, was insufficient. *Rheinstein v. McDougall*, 252.

AWARD. See Arbitration, 1.

"AYE AND NO" VOTE. See Constitutional Law, 3.

BANKRUPTCY.

Bankrupt Act—Mortgage—Time of Execution of Power of Sale.—The provision of the Bankrupt Act making all debts owing by the bankrupt due and payable at the date of the adjudication, does not affect the terms of a mortgage executed by him, in which the date at which the power of sale may be executed is fixed. *Martin v. Kirkpatrick*, 400.

BETTERMENTS. See Deeds and Conveyances, 33, 24.

BILL OF LADING. See Penalty Statutes, 3; Carriers of Goods, 4.

BILL OF PARTICULARS. See Indictment, 4, 5.

BOND ISSUES.

Taxation—Legislative Power.—The Legislature, having the power to impose a general limitation upon the taxing power of municipalities, may ratify a bond issue previously declared invalid by the Courts on that account, and except any particular municipality from the operation of the general law. *Wharton v. Greensboro*, 62.

BOUNDARIES. See Deeds and Conveyances, 25, 26, 35; Municipal Corporations, 2; Stock Law, 1, 2.

BRIEF, EXCEPTIONS ABANDONED. See Appeal and Error, 12.

BROADSIDE EXCEPTIONS. See Objections and Exceptions, 3.

BURDEN OF PROOF.

1. *Penalty Statutes—Carriers of Goods—Demand in Writing—Parol Evidence.*—In an action for penalty, under Revisal, sec. 2634, against a carrier for failure to pay or adjust a claim within a specified time after filing it with the carrier's agent, parol evidence was competent to show that plaintiff filed his claim, and was subsequently paid the amount thereof; (1) The contents of the paper were collateral to the controversy and it was not necessary to introduce it in evidence; (2) The writing was in the carrier's possession and could be used for the purposes of contradiction; (3) The burden of proof was on the carrier to show that the claim was not filed, or was excessive. *Rabon v. R. R.*, 59.

2. *Negligence—Evidence—Burden of the Issue—Instructions.*—In an action to recover damages to plaintiff's property alleged to have been negligently caused by sparks emitted from defendant's passing engine, when there was evidence tending to show negligence. *Held*, (1) It was error in the trial Judge to charge the jury, in effect, that if they found the evidence to be true there would be a presumption in law of defendant's negligence, and the burden of proof would be upon defendant to show to the contrary; (2) Plaintiff's evidence made out a *prima facie* case to the extent only of carrying the case to the jury to find whether or not the injury was caused by defendant's negligence; (3) The burden of the issue does not shift from plaintiff, while the burden of proof may do so. (*Winslow v. Hardwood Co.*, 147 N. C., 275, cited and approved). *Cox v. R. R.*, 117.

3. *Principal and Agent, Transactions Between—Fraud—Presumption.*—When one is the general agent of another, who relies upon him as a friend and adviser, and has entire management of his affairs, a presumption of fraud, as a matter of law, arises from a transaction between them wherein the agent is benefited, and the burden of proof is upon the agent to show by the greater weight of the evidence, when the transaction is disputed, that it was open, fair and honest. *Smith v. Moore*, 185.

4. *Instructions — Charge Construed as a Whole.*—There is no reversible error in the charge of the Court to the jury imposing the burden of the issue upon defendant, in an action to recover upon a note secured by a mortgage, when the charge, construed as a whole, clearly places the burden upon the plaintiff, the proper party. *Haines v. Smith*, 279.

5. *Deeds and Conveyances—Delivered to Third Party—Presumptive Delivery—Evidence—Verdict Directing—Questions for Jury.*—The presumption is that a deed duly proven was

BURDEN OF PROOF—*Continued.*

executed and delivered at the time it bears date. The burden of proof is upon the party seeking to attack its validity to show the contrary. Therefore, the Court erred in directing a verdict, but should have submitted the issue to the jury with appropriate instruction. *Fortune v. Hunt,* 358.

6. *Carriers of Goods—Shipper's Load and Count.*—When, in a suit by the consignee against a carrier for the value of a carload shipment, and penalty for failure to deliver, under Revisal, sec. 2632, it was admitted that it was the duty of the shipper to load the car; and that the carrier was not required to verify the loading, but gave the bill of lading, in evidence, upon the statement of the shipper, the burden of proving the contents of the car is upon the consignor, under the doctrine that he who has the best opportunity of knowing the facts must prove them. *Peele v. R. R.,* 390.

7. *Appeal and Error—Larceny—Value of Goods—Term of Sentence.*—When there is no evidence appearing in the record of the value of goods stolen by defendant, but it appears that they consisted of eighteen hams, eleven shoulders and eight sides of meat, he cannot successfully contend that a maximum sentence of twelve months' imprisonment could not be imposed, for it is incumbent on him to prove the value in diminution of the sentence. *State v. Dixon,* 460.

8. *Penalty Statutes—Reasonable Doubt.*—Upon trial for violating the provisions of Revisal, sec. 3844, it is error for the lower Court to charge the jury that the burden was upon defendant to show that a certain freight train was run without its permission, when there is conflicting evidence upon that question; for, in order to convict, they should find as a fact, beyond a reasonable doubt, that the defendant had permitted the running of the train in violation of the statute. *State v. R. R.,* 470.

9. *Murder—Admissions, Effect of—Malice.*—Upon a trial for murder in the second degree, testimony by a State's witness of declarations of defendant subsequent to the killing that he had to kill deceased, the killing with a deadly weapon being admitted, is but an admission of the homicide alone, raising, in law, the presumption of malice, and puts the burden of showing self-defense or manslaughter upon the prisoner. *State v. Peterson,* 533.

10. *Murder—Insanity—Presumption.*—The presumption is that a prisoner on trial for murder was sane at the time of the homicidal act, with the burden on him to prove the contrary. *State v. Cloninger,* 567.

BURIAL, TIME OF. See Telegraph Companies, 7.

BURNING BARN. See Evidence, 73.

BURNT RECORDS. See Partition, 4.

BUYER, AGENT OF. See Intoxicating Liquors, 8.

CALLS. See Deeds and Conveyances, 24, 35, 40, 41.

CARRIERS OF GOODS.

1. *Penalty Statutes—Demand in Writing—Parol Evidence—Burden of Proof.*—In an action for penalty, under Revisal, sec. 2634, against a carrier for failure to pay or adjust a claim within a specified time after filing it with the carrier's agent, parol evidence was competent to show that plaintiff filed his claim, and was subsequently paid the amount thereof; (1) The contents of the paper were collateral to the controversy and it was not necessary to introduce it in evidence; (2) The writing was in the carrier's possession and could be used for the purposes of contradiction; (3) The burden of proof was on the carrier to show that the claim was not filed, or was excessive. *Rabon v. R. R.*, 59.

2. *Penalty Statutes—Failure to Pay and Adjust Claim—Proviso—Recovery Full Amount Claimed—Settlement.*—The proviso that consignee must first recover the full penalty under Revisal, sec. 2634, for the failure of the carrier to pay or adjust a claim under the requirements thereof, is only to protect the carrier against excessive demands and not to discourage settlements for losses. Hence, the plaintiff's right to recover the penalty in such suits is not lost by accepting settlement for damages for full amount claimed after the penalty had accrued. *Ibid.*

3. *Penalty Statutes—Draft—Bill of Lading Attached—Title—Contracts.*—There is no contractual relation between the carrier and a payee of a draft, in a shipment made to consignor's order, "notify," etc., "bill of lading attached to draft," until the draft is paid by him and the title to the goods passes; and, until then, he cannot recover a penalty in his action against the carrier for delay in their transportation. (*Stone v. R. R.*, 144 N. C., 220, cited and distinguished). *Mfg. Co. v. R. R.*, 261.

4. *Shipper's Load and Count—Bill of Lading—Presumptive Evidence—Rebuttal.*—When it is admitted that it was the consignor's duty to load a car for shipment, which had been placed at its mill for the purpose by the carrier, and that the carrier's agent gave a bill of lading upon the statement of the consignor that the car had been loaded, without being

CARRIERS OF GOODS—*Continued.*

required to verify the statement, the bill of lading is not presumptive evidence of the receipt of the contents of the car, for the carrier's *prima facie* liability is rebutted by the admissions, and the question is an open one for the jury, in a suit by the consignee for the value of the contents of the car, and for the penalty for failure to deliver under Revisal, sec. 2632. *Peele v. R. R.*, 390.

5. *Same—Burden of Proof.*—When, in a suit by the consignee against a carrier for the value of a carload shipment, and penalty for failure to deliver, under Revisal, sec. 2632, it was admitted that it was the duty of the shipper to load the car; and that the carrier was not required to verify the loading, but gave the bill of lading, in evidence, upon the statement of the shipper, the burden of proving the contents of the car is upon the consignor, under the doctrine that he who has the best opportunity of knowing the facts must prove them. *Ibid.*

6. *Penalty Statutes—Regular Stations—Refusal to Accept Shipment.*—A refusal by the carrier's agent to receive, at is depot, freight, and transportation charges therefor, destined for a point on the carrier's road which was only a siding, and was not a regular station, is wrongful, and subjects the carrier to the penalty prescribed by Revisal, sec. 2631, when the refusal is on the ground that the agent did not know where the given destination was, and it appears that he could have ascertained that freight was ordinarily shipped there on way bills made out to a regular station on the carrier's road some two miles distant therefrom. *Reid v. R. R.* 423.

7. *Same- Evidence.*—When a shipment of freight and transportation charges are refused by carrier's agent because he did not know where its given destination was, and it appears that the name given was very slightly changed from that appearing on the "Official Railway Guide and Shipping Guide" used by the carrier; the fact that another agent, who afterwards took the place of the first, promptly learned the location of the destination and the rate, and gave bill of lading and made shipment, is evidence that the rate and destination could have been ascertained by the first from the information given him, in an action for the penalty prescribed by Revisal, sec. 2631. *Ibid.*

8. *Penalty Statutes — Refusal to Accept Shipment — Commerce Clause — Constitutional Law.* — The penalty arising under Revisal, sec. 2631, from the wrongful refusal of carrier's agent to accept an interstate shipment of freight, bears no relation to the Commerce Clause of the Federal Constitution,

CARRIERS OF GOODS—*Continued.*

for the penalty accrues before the freight is accepted for transportation. *Ibid.*

9. *Penalty Statutes—Refusal to Accept Shipment—"Party Aggrieved."*—The shipper of the goods is the "party aggrieved," and is the one entitled to sue for the penalty prescribed in Revisal, sec. 2631, which arises from the wrongful refusal of the carrier's agent to accept them for transportation. *Ibid.*

CARRIERS OF PASSENGERS.

1. *Pleadings—Principal and Agent—Scope of Authority—Ticket Agents—Demurrer.*—A motion to dismiss upon the complaint should be denied, when it is alleged that plaintiff, through her agent, bought of defendant railroad company's agent at its station, S., a ticket from K. to S. under contract that the plaintiff at K. was to be notified at once thereof by defendant's agents, which was not done within six days, through the defendant's carelessness and negligence, whereby plaintiff, who had no money with her, was unduly delayed, to her great damage. *Reeves v. R. R.*, 244.

2. *Same—Evidence—Questions for Jury.*—Evidence is sufficient to go to the jury upon the authority of defendant's agent at S., a station on its road, to receive money for the purchase of a ticket from K., another station thereon, to S., to be delivered to plaintiff by the agent at K., which shows a receipt for the payment of the ticket at S., stating that it was from K. to S.; a telegram from the agent at S. to the one at K., directing that the ticket, as contended for, be furnished plaintiff; the agent at K. informed plaintiff that he could not furnish it until he had been so advised; the actual furnishing of the ticket as contended for, thereafter, on a regular form used by the defendant for such service. *Ibid.*

CAUSE PENDING. See Jurors, 3.

CERTIFICATE. See Partition, 5.

CHALLENGE. See Jurors, 1, 5.

CHARACTER. See Evidence, 103.

CHARACTER OF DECEASED. See Evidence, 89, 96, 102.

CHARACTER WITNESS. See Witnesses, 6, 7.

CHARGE IN WRITING. See Instructions, 18, 19.

CHARGE ON LAND. See Deeds and Conveyances, 6.

CHARGE ORALLY. See Instructions, 18.

CHILDREN. See Deeds and Conveyances, 16.

CHILLING SALE. See Mortgagor and Mortgagee, 6.

CIRCUMSTANTIAL EVIDENCE. See Evidence, 91.

CLERK OF THE COURT.

1. *Partition of Lands — Procedure — Appeal — Duty of Clerk — Superior Court.* — Under proceedings for the partition of lands, when an appeal is taken from the decision of the Clerk (Revisal, secs. 610 and 611) upon issues of law or legal inference, it is his duty to prepare and make a statement of the case and send it to the Judge (Revisal, sec. 612). Under Revisal, sec. 717, when an equitable or other defense is pleaded, the Clerk should transfer the cause to the civil docket, for trial during term, upon the issues raised, and the Judge may allow amendments to the pleadings for the purpose of hearing the case upon its merits. *Little v. Duncan,* 84.

2. *Partition of Lands—Order of Clerk—Revoking Order—Docketing Case for Trial.*—The Clerk may correct a mistake made in prematurely ordering land partitioned, by revoking the order and directing the proceedings to be docketed in the Superior Court. *Ibid.*

3. *Partition of Lands—Superior Court Jurisdiction.*—When the Superior Court acquired possession of a case of partitioning land, in term, it should have preceded therewith according to law, and it was error to remand it to the Clerk. *Ibid.*

4. *Deeds and Conveyances—Proceedings for Division of Lands—Commissioners' Report—Original Papers—Burnt Records—Recording Report.*—When a paper purporting to be an original report of a division of lands, in correct form and signed by the several commissioners, under seal, but which has never been registered, is presented to the Clerk of the court after the court-house has been burned and the records destroyed, with an entry thereon appearing to be in the handwriting of a deceased former clerk, that the commissioners made the report in open court, and that the report was confirmed and ordered to be recorded, it is the duty of the Clerk, after satisfying himself upon evidence that the report is the original one, and that the entry is in the handwriting of the former clerk, to have the report recorded, even against the objection of a party in interest, in the absence of suggestion of fraud or that the report was not genuine. *Hall v. Lane,* 267.

5. *Same—Certificate—Color of Title.*—When, after the records of the court have been destroyed by fire, a paper, appearing to

CLERK OF THE COURT—*Continued.*

be the original report of commissioners to divide lands, with an entry ordering registration made by a former clerk, and which has not before been registered, is recorded by the Clerk and registered, after having satisfied himself of its being the original and genuine, an allotment of a part of the land therein is color of title as to that tract, and a certified copy is competent evidence in an action involving that question. *Ibid.*

6. *Deeds and Conveyances—Color of Title—Commissioners' Report—Recording—Presumption.*—When a certified copy of a report of commissioners to divide land is put in evidence as color of title, by a party in interest claiming a part of the land therein described, it must be presumed, in the absence of proof to the contrary, that the paper was duly recorded in accordance with an order directing it. *Ibid.*

COLLUSION. See Mortgagor and Mortgagee, 6.

COLOR OF TITLE.

1. *Deeds and Conveyances—Partition—Certificate.*—When, after the records of the court have been destroyed by fire, a paper, appearing to be the original report of commissioners to divide lands, with an entry ordering registration made by a former clerk, and which has not before been registered, is recorded by the Clerk and registered, after having satisfied himself of its being the original and genuine, an allotment of a part of the land therein is color of title as to that tract, and a certified copy is competent evidence in an action involving that question. *Hill v. Lane*, 267.

2. *Deeds and Conveyances—Commissioners' Report—Recording—Presumption.*—When a certified copy of a report of commissioners to divide land is put in evidence as color of title, by a party in interest claiming a part of the land therein described, it must be presumed, in the absence of proof to the contrary, that the paper was duly recorded in accordance with an order directing it. *Ibid.*

3. *Deeds and Conveyances—Adverse Possession—Evidence—Nonsuit.*—When adverse possession of the land in question for more than seven years under a deed to a married woman is shown as color of title, and an ouster and continuous adverse possession of a part of the land contained in the description is shown during her coverture, and it further appears that the husband was entitled as tenant by the courtesy, and held possession after her death, to within two years next preceding the time of trial, and that the plaintiffs, the heirs-at-law, have had possession since then, the evidence is sufficient

COLOR OF TITLE—*Continued.*

to carry the case to the jury, and a judgment as of nonsuit upon the evidence was properly disallowed, when title out of the State has been admitted. *Ibid.*

4. *Married Women—Husband and Wife—Tenant by the Courtesy — Heirs-at-Law — Statute of Limitations.* — The statute of limitations does not begin to run against a married woman, in adverse possession of lands under color for the required time, by ouster of a part thereof during her coverture, or, after her death, against her heirs-at-law during the continuous adverse possession of the husband as tenant by the courtesy. *Ibid.*

5. *Deeds and Conveyances—Grantor in Possession—Subsequent Deed—Adverse Possession.*—When a grantor of a deed remaining in possession subsequently purchases from another the land described therein, and takes a deed therefor to himself, the second deed is color of title which open, notorious, continuous adverse possession may ripen into a perfect title against all persons not under disability. *Chatham v. Lansford*, 363.

COMMERCE CLAUSE. See Interstate Commerce, 2; Constitutional Law, 15.

COMMISSIONERS' REPORT. See Partition, 4.

COMMISSIONS. See Trusts and Trustees, 1.

COMMON PURPOSE. See Mortgagor and Mortgagee, 6.

COMMON SOURCE. See Evidence, 1, 2, 3, 4.

CONCURRENT JURISDICTION. See Jurisdiction, 3.

CONCURRENT NEGLIGENCE. See Proximate Cause, 3.

CONDEMNATION PROCEEDINGS.

1. *Municipal Corporations — Discretionary Powers — Public Welfare—Shade Trees.*—The Courts will not interfere with the exercise of discretionary powers conferred upon municipal corporations for the public welfare, unless their action should be clearly so unreasonable as to amount to an oppressive and manifest abuse of their discretion; and, when in the exercise of their proper discretion, the authorities order shade trees along the sidewalks in front of a citizen's residence to be cut down to the injury of his property, for the preservation of the city sewerage, a restraining order should not be granted. (*Tate v. Greensboro*, 114 N. C., 392, cited and applied). *Rosenthal v. Goldsboro*, 128.

CONDEMNATION PROCEEDINGS—*Continued.*

2. *Municipal Corporations—Discretionary Powers—Public Welfare — Shade Trees — Notice — Damnum Absque Injuria.* — When a municipality, within the proper exercise of its discretionary powers conferred upon them for the welfare of the public, condemn the trees on the sidewalk in front of the property of the citizen, no legal right of the citizen is infringed upon, and no previous notice to him is required. The injury, if any suffered by him, is *damnum absque injuria.* (*Brown v. Electric Co.*, 138 N. C., 533, cited and distinguished). *Ibid.*
3. *Railroads—Jurisdiction—Removal of Causes—Federal Courts—Money Demand.*—The jurisdiction of the Federal Courts is not affected in a suit wherein the plaintiff claims damages from a foreign corporation, for an additional and alien burden upon his lands; for it is not a question of appropriating property against the owner's will, as in the enforcement of the right to acquire land by condemnation proceedings. *McCulloch v. R. R.*, 305.

CONFESSION. See Malicious Prosecution, 1; Pleas, 3.

CONSIDERATIONS.

1. *Mortgagor and Mortgagee—Illegal—Evidence—Questions for Jury.*—When the defense to an action for the possession of personal property, claimed under mortgage by a subsequent purchaser, is that the consideration for the mortgage was the suppression of a criminal prosecution, and there is some evidence tending to show that the withdrawal of the prosecution was an independent transaction, not influenced by the promise to give the note and mortgage, it is sufficient to go to the jury. *Henderson-Snyder Co. v. Polk*, 104.
2. *Advantages Received.*—When the insured has given his note for the premiums on his life insurance policy, and has received for one year, in this manner, the benefits of the insurance, he cannot avoid paying his note upon the ground of his having collaterally contracted with the company for deduction of certain amounts by way of renewal commissions in violation of the provisions of Revisal, 4775. *Annuity Co. v. Costner*, 293.

CONSPIRACY. See Pleadings, 2; Evidence, 82.

CONSTITUTIONAL LAW.

1. *Taxation, Limitation Imposed On — Legislative Power.* — The limitation imposed upon cities in creating a bonded indebtedness is by statute, Revisal, sec. 2977, and not a constitutional one. *Wharton v. Greensboro*, 62.

CONSTITUTIONAL LAW—*Continued.*

2. *Same — Ratification.* — The Legislature, having the power to impose a general limitation upon the taxing power of municipalities, may ratify a bond issue previously declared invalid by the Courts on that account, and except any particular municipality from the operation of the general law. *Ibid.*

3. *Municipal Corporations — Territory Annexed — Aye and No Vote.*—When a municipal charter has been passed in accordance with Art. II, sec. 14, of the Constitution, requiring the aye and no vote to be taken on the several days, it is not necessary for an act annexing territory thereto to be passed in like manner to confer authority for the levying of taxes within the territory annexed. *Lutterloh v. Fayetteville*, 65.

4. *Municipal Corporations—Taxation—Representation.* — An objection to the validity of an act adding territory to that of a town, for that it restricted the right to vote on the subject of municipal taxation to the voters within the annexed territory, is without merit, when it appears from a construction of the act as a whole that a contrary intention is declared. *Ibid.*

5. *Municipal Corporations — Territory Annexed — Consent of Voters — Legislative Powers.* — There is no constitutional restriction here, and our Legislature may annex contiguous or adjoining territory to that of a municipality, without the consent of the voters thereof, or of the old territory, and such action is not subject to review by the Courts. *Ibid.*

6. *Municipal Corporations — Charters — Contractual Rights — Vested Rights—Legislative Powers.*—No vested rights can accrue under a municipal charter as it is not a contract between the citizens of the municipality and the State; nor can valid objection be made to the Legislature annexing territory thereto on the ground that the old territory owed debts, for the presumption is that value was received which inures to the benefit of those residing within the territory annexed. *Ibid.*

7. *Due Process.* — A statute authorizing an assessment which provides for a notice that will enable the property owner to appear before some authorized tribunal and contest the validity and fairness of the assessment before it becomes a fixed charge on his property, is not open to the objection that it deprives the owner of his property without due process of law. *City of Kinston v. Loftin*, 255.

8. *Same—Notice—Remedies.*—The action of a municipality to enforce the collection of a special assessment against the property of a citizen, when in strict accordance with the provisions of a statute authorizing it, is not invalid or unconstitutional on the ground that previous notice of the assess-

CONSTITUTIONAL LAW—*Continued.*

ment was not given, when the statute gives the citizen the right to set up every available defense in the action pending. *Ibid.*

9. *Married Women.*—The provisions of the Constitution, relating to married women, makes no change in the estate in lands by husband and wife in entirety, or the right of survivorship therein. *Jones v. Smith*, 318.

10. *Carriers of Goods—Penalty Statutes—Refusal to Accept Shipment—Commerce Clause.*—The penalty arising under Revisal, sec. 2631, from the wrongful refusal of carrier's agent to accept an interstate shipment of freight, bears no relation to the Commerce Clause of the Federal Constitution, for the penalty accrues before the freight is accepted for transportation. *Reid v. R. R.*, 423.

11. *Executive Pardons Upon Condition — Constitutional Right to Grant.*—The Governor is given the power to grant a pardon upon a condition precedent that the prisoner pay costs of trial; and upon condition subsequent, that he remain of good character, and be sober and industrious. Constitution, sec. 6, Art. III. *In re Williams*, 436.

12. *Legislative Power—"Recorder's Court"—Jurisdiction, Defined.*—The Legislature has the constitutional power to create a "recorder's court" of a city, giving it original jurisdiction over all criminal offenses below that of felony, and declare them to be "petty misdemeanors." *State v. Shine*, 480.

13. *Same—Appeal—Trial by Jury.*—When a legislative act creates a court of original jurisdiction for the trial of petty misdemeanors, and prescribes an appeal to the Superior Court, the constitutional right of trial by jury is preserved. *Ibid.*

14. *Legislative Powers—Courts—Appeal—Grand Jury.*—No valid objection can be raised to the constitutionality of a court created by the Legislature, preserving the right of appeal to the Superior Court, because a grand jury is not the first to pass upon a bill of indictment charging the offense. *Ibid.*

15. *Commerce Clause.*—A sale of whiskey consummated in another State, by order of one as agent for the buyer sent from a place in the State where the sale is prohibited, is not indictable under the Commerce Clause of the Federal Constitution, and State legislation cannot affect the transaction, in respect to its criminality, until and after there had been a delivery within the State. *State v. Whisenant*, 515.

16. *Punishment Excessive—Cruel or Unusual.*—In this case, punishment for nine years in the penitentiary was not excessive, or cruel or unusual, within the meaning of the Constitution. *State v. Lance*, 552.

CONSTITUTIONAL LIMITATIONS. See Constitutional Law, 1, 2.

CONSTRUCTIONS OF DEEDS. See Deeds and Conveyances, 14, 49, 50.

CONSTRUCTION OF STATUTES. See Interpretation of Statutes.

CONSTRUCTION OF WILLS. See Wills, 1, 2, 3, 4.

CONTENTION. See Instructions, 4.

CONTRACTS.

1. *Breach by Vendee—Vendor in Possession—Vendor's Sale in Good Faith—Measure of Damages.*—On breach of contract by vendee in a sale of a stock of merchandise, the vendor, remaining in possession, may resell the goods with utmost good faith and with diligence as agent of the vendee, and recover, as damages, storage and interest on the purchase price, together with the difference between the price at which it was thus sold and that agreed upon in the contract. The question whether the resale was at a fair price is for the jury. (*Heiser v. Meares*, 120 N. C., 443, cited and distinguished). *Clothing Co. v. Stadiem*, 6.
2. *Measure of Damages—From What Time Estimated.*—Parties to a contract are presumed to have contracted with reference to the damages which would arise from a breach thereof under the conditions existing at the time of the breach. *Hawk v. Lumber*, 10.
3. *Same—Evidence—Matters in Diminution of.*—When a party to a contract thereby agreed to log the lands of the other party at a certain price, and was prevented from fulfilling his agreement by the breach thereof of the other, evidence of the subsequently increased price of labor, for the purpose of showing a diminution in the profits of logging during the period of time required to fulfill the contract, is incompetent, and a charge to the jury based upon that theory is erroneous. *Ibid.*
4. *Damages Present and Prospective—Procedure.*—When there has been a definite and absolute breach of a contract which is single and entire, all damages, both present and prospective, suffered by the injured party, may and usually must be recovered in one and the same action. *Wilkerson v. Dunbar*, 20.
5. *Prospective Profits, When Recoverable.*—When prospective damages are allowed to the injured party as arising under a breach of contract, they must be such as are in reasonable

CONTRACTS—*Continued.*

contemplation of the parties and capable of being ascertained with a reasonable degree of certainty; and while profits prevented are frequently held to be excluded, they are those expected by reason of collateral engagements, or dependent to a great extent on the uncertainty of a trade and fluctuations of the market. *Ibid.*

6. *Prospective Profits, How Estimated.*—When an injured party to a contract is entitled to recover prospective damages, proper allowance should be made for the fact that recovery is had for damages that would have accrued at a future time, and the Courts and juries should see that such is made for those fluctuations which are likely to occur. Where, however, the recovery is for the cutting and delivery at a certain price of several millions of feet of timber, a contract requiring years in its performance beyond the time when the breach was established, it was error in the trial Judge to instruct the jury, generally, that the measure of damages was the difference between the amount to be paid for the work and the cost of performance. This is correct as to damages already accrued, but, as to those to arise in the future, the rule should be the present value of such damages. *Ibid.*

7 *Prospective Profits — Contemplation of Parties.* — Prospective profits are advantages which are the direct and immediate fruits of the contract entered into between the parties, are a part and parcel of the contract, and presumed to have been taken into consideration at the time it was made. *Ibid.*

8. *Witnesses—Expert Testimony as to Facts.*—Witnesses shown to be familiar with the tract of land, and lumbermen of experience having personal knowledge of the facts and conditions, may give their opinion as to the cost of cutting and delivering timber, and the profits per thousand feet, when the same is relevant to the inquiry in a suit for damages arising from a breach of contract. *Ibid.*

9. *Jurisdiction—Justices of the Peace—Amount Involved.*—The test of the jurisdiction of a Justice of the Peace is the sum demanded in the summons, and when the sum so demanded in a suit upon contract does not exceed $200, he has jurisdiction, though it may appear on the Justice's docket that a greater sum could have been demanded on the facts alleged. *Teal v. Templeton*, 32.

10. *Timber Interests — Writing — Jurisdiction—Justice's Court.*—A contract of lease of land for three years or less need not be in writing. Title to land is not drawn into controversy, and a Justice's court has jurisdiction. *Ibid.*

CONTRACTS—*Continued.*

12. *Options—Rights of Parties.*—Defendant contracted with N. Bros. to give them an option on his stock, in an incorporated company, with the privilege of buying at any time within three years. He afterwards placed the stock in the hands of a trustee for the purpose of securing the performance of a contract made with K. with direction to sell to "some parties agreeable to N. Bros." In an action by K. against defendant, and the trustee, to compel the latter to sell the stock, N. Bros. were made parties defendant and asserted their rights under the option contract. *Held,* that an order to sell the stock should not have been made until the rights of N. Bros. had been passed upon. K. and the trustee took the stock subject to the rights of N. Bros. *Kuker v. Snow,* 181.

13. *Carriers of Goods—Penalty Statutes — Draft — Bill of Lading Attached—Title.*—There is no contractual relation between the carrier and a payee of a draft, in a shipment made to consignor's order, "notify," etc., "bill of lading attached to draft," until the draft is paid by him and the title to the goods passes; and until then, he cannot recover a penalty in his action against the carrier for delay in their transportation. (*Stone v. R. R.*, 144 N. C., 220, cited and distinguished). *Mfg. Co. v. R. R.*, 261.

14. *Insurance—False Representations—Expressions of Opinion—Statements of Fact — Questions for Jury.* — Declarations, though clothed in the form of an opinion or estimate, made by a duly authorized agent to induce a contract or policy of insurance, accepted and reasonably relied upon by the other party as statements of facts, may be considered upon the question of whether fraud had been thereby perpetrated; and when there is doubt as to whether they were intended and received as mere expressions of opinion, or statement of facts to be regarded as material, the question is one for the jury. *Whitehurst v. Ins. Co.*, 273.

15. *Insurance — Principal and Agent — Agent's False Representations—Knowledge Imputed—Liability.*—When an agent of an insurance company has induced the insured to take a policy of insurance in his company by making misrepresentation of a material fact concerning which, as such agent, he should have known the truth, or makes it recklessly or affirms its existence positively, when he is consciously ignorant whether it be true or false, his principal may be held responsible by the insured relying, and having reasonable ground to rely, upon the agent's statement as importing verity. *Ibid.*

16. *Same.*—A stipulation in a policy of life insurance, among other things, gave the plaintiff, the insured, the option to "surren-

CONTRACTS—*Continued.*

der this policy and withdraw the entire cash value—that is, the legal reserve, computed according to the actuary's table of mortality, and four per cent. interest, together with the dividend." There was evidence tending to show that the agent of the defendant, the insurance company, induced the plaintiff, a blind man, to take out the policy by reading this stipulation to him, and falsely informing him that the company, at the end of ten years, would pay back the premiums with interest. *Held*, (1) It was a question for the jury as to whether these assurances were intended as statements of fact, accepted and reasonably relied upon by plaintiff as material inducement to the contract; (2) An affirmative finding of the jury thereon established an actionable fraud imputable to defendant company, entitling plaintiff to recover the premiums paid, and interest. *Ibid.*

17. *Insurance—Valid and Invalid—Severable.*—A valid contract or policy of life insurance is severable from an invalid collateral agreement made at one and the same time, respecting a benefit prohibited by statute. *Annuity Co. v. Costner*, 295.

18. *Same—When Enforcible.*—When two contracts are made at one and the same time respecting a contract or policy of life insurance, one valid and the other invalid, the valid contract is enforcible if severable from the invalid one. *Ibid.*

19. *Same—Rebates.*—A contract or policy of life insurance regularly issued and valid, is not affected by a collateral agreement that the company would deduct certain amounts by way of renewal commissions as credits on the premium; and a defense to the payment of a note given for the premiums is untenable, that the policy and note are void for reason that the special benefits or rebates were given to certain persons, and not all, of the "same class and expectation of life." Revisal, sec. 4775. Whether the collateral agreement in this case is violative of the statute, *quaere*. *Ibid.*

20. *Same — Consideration — Advantages Received.*—When the insured has given his note for the premiums on his life insurance policy, and has received for one year, in this manner, the benefits of the insurance, he cannot avoid paying his note upon the ground of his having collaterally contracted with the company for deduction of certain amounts by way of renewal commissions in violation of the provisions of Revisal, 4775. *Ibid.*

21. *Pleadings—Warranty—Counterclaim—Allegations.* — Evidence tending to show a breach of warranty in a contract for the sale of goods is incompetent when the warranty was not specially pleaded. *Woodbridge v. Brown*, 299.

CONTRACTS—*Continued.*

22. *Warranty—Evidence.*—The mere facts that the seller of merchandise knew the purpose for which it was purchased, and, at the time, said that the grade would do, and used for the purpose intended, does not constitute a warranty. *Ibid.*

23. *Same—Quality of Merchandise.*—In the absence of warranty of the grade of merchandise sold and delivered, evidence that the merchandise was of inferior quality is inadmissible, though the purchaser could not have ascertained that the quality was inferior except in its use. *Ibid.*

24. *Same—Instructions.*—It is not error in the trial Judge to instruct the jury to find for the plaintiff, upon the whole evidence, in an action upon contract for goods sold and delivered, when the only defense set up was by way of counterclaim for breach of warranty, the defendant having failed to allege and prove a breach of warranty. *Ibid.*

25. *Spirituous Liquors — Sale in Prohibited Territory — Action — Doctrine, In Pari Delicto.*—An action on account of sale of cider brought by the successor in business of the vendor firm cannot be maintained, when it is established that the cider sold was intoxicating, that this was known to the parties and prohibited by law. Under the doctrine of *in pari delicto*, the parties are left *in statu quo*. *Vinegar Co. v. Hawn*, 355.

26. *Spirituous Liquors — Sale Prohibited Territory — Interstate Shipment.*—A contract of sale of spirituous liquors made in this State, to be delivered in prohibited territory here, is illegal, and cannot be enforced though shipped from another State. *Ibid.*

27. *To Convey Lands—Equity—Parties—Imperfect Title.*—Specific performance of a contract to convey an indefeasible title to lands will not be enforced in equity against a purchaser at the suit of one having the life estate, when those in remainder have not been made parties and would not be bound by the decree. *Triplett v. Williams*, 394.

28. *Deeds and Conveyances—Contracts to Convey—Equity—Fraud or Mistake—Reasonable Relief.*—When the defense to an action for specific performance to convey land is that, as a part of the consideration for the contract, entering into the treaty and forming part of the negotiations, the plaintiff was to give defendant an option on another tract of land, which was not done, the contention does not necessarily involve an allegation of fraud or intentional wrong, but in this case only the question of a reasonably well grounded belief on defendant's part that the option was to be given. *Rudisill v. Whitener*, 439.

CONTRACTS—*Continued.*

29. *Deeds and Conveyances—Contracts to Convey—Treaty—Negotiations—Written Contract—Parol Evidence—Fraud or Mistake.*—When the written contract to convey lands sued on is admitted to have been signed as written, but the defense is that specific performance should not be decreed, on the ground that the defendant was induced to enter into it by the promise of the plaintiff to transfer to him a certain option on another tract of land he held, which was not done, parol evidence of all the facts and circumstances surrounding the treaty and entering into the negotiation is competent, not to correct the writing, but to enable the Court to ascertain whether there was any element of mistake or unfair advantage in the transaction taken by the party seeking equitable relief. *Ibid.*

CONTRACTS TO CONVEY LANDS. See Contracts, 27, 28, 29.

CONTRIBUTORY NEGLIGENCE. See Negligence.

1. *Railroads—"Look and Listen"—Obstructed View—Questions for Jury.*—While a person who had voluntarily gone on a railroad track, where the view was unobstructed, and failed to look and listen, cannot recover damages for an injury which would have been avoided by his having done so, when the view is obstructed or other existing facts tend to complicate the matter, the question of contributory negligence may become one for the jury. *Inman v. R. R.*, 123.

2. *Same—Evidence.*—Where there is evidence tending to show that a railroad company has several tracks in a city over which the plaintiff usually went in going to and from his work, and that the view of the track was obstructed, and plaintiff, standing within two paces of the track, having listened for warnings he had a right to expect, but which were not given, stepped upon the track and was injured by defendant's train running at a much greater speed than allowed by the town ordinance, and which was unsafe at the place indicated, the question of contributory negligence is properly submitted to the jury. *Ibid.*

3. *Evidence—Safe Appliances.*—When there is evidence tending to show that plaintiff was injured while in defendant's employment, by a log falling on him which he was carrying at the time, caused by defendant's negligent orders and negligent failure to furnish proper tools for the purpose, it is competent, to negative contributory negligence, to ask the plaintiff if he caused the log to fall on himself. *Rushing v. R. R.*, 149.

CONTRIBUTORY NEGLIGENCE—*Continued.*

4. *Evidence—Safe Appliances—Assumption of Risks.*—The employer, a railroad company, owes a duty to the employee to furnish safe and suitable tools and appliances for work to be done by him, and the employee does not assume the risk of doing the work without them unless the act was obviously so dangerous that, in its careful performance, the inherent probabilities of injury were greater than those of safety. *Ibid.*

5. *Same—Proximate Cause.*—When the injury complained of was the failure of the railroad to furnish certain implements, called "lug hooks," for moving heavy timber, which plaintiff was employed to help move, it is proper for the trial Judge to instruct the jury that, if they should find, by the greater weight of the evidence, that for such service "lug hooks" were usually used by railroads for the work, it was the duty of the railroad to have furnished them; that if they further found, by the greater weight of the evidence, that the character of the work was such that a man of ordinary prudence would be led to see that their use were safer, the failure to provide them would be negligence, which, if the proximate cause, would render defendant liable. *Ibid.*

6. *Evidence Conclusive.*—When it appears that plaintiff's intestate was injured by attempting to go between two cars of defendant's train, chained together on a live track in constant use, and that he could easily have walked around the train by going from seventy to ninety feet and have avoided the injury, his act constitutes contributory negligence which bars recovery by his administrator. *Beck v. R. R.*, 168.

7. *Negligence — Instructions — Verdict, Facts Established By.* — When the question of defendant's negligence is dependent upon whether the engineer stopped the train in an unusually rough or jolting manner, and the Court charges the jury to find the appropriate issue for defendant if the engineer stopped it in the usual or ordinary manner, a verdict in plaintiff's favor establishes the defendant's negligence; and, further, when the Court charges the jury to answer likewise in defendant's favor if the plaintiff did not take all ordinary precautions to protect himself against all shocks or jolts, a verdict in plaintiff's favor clears him of contributory negligence. *Bull v. R. R.*, 427.

8. *Same—Irrelevant Questions—Harmless Error.*—When it has been established by the verdict of the jury, that, through defendant's negligence, without contributory negligence on plaintiff's part, plaintiff was thrown from the top of a car and injured, the burden being on plaintiff, his having intro-

CONTRIBUTORY NEGLIGENCE—*Continued.*

duced immaterial evidence relating to a defective brake wheel, upon which he was thrown, is harmless error as the questions arising therefrom could not affect the result. *Ibid.*

9. *Railroads — Permissive Licensee — Proximate Cause.* — The defendant railroad had piled scantling along its right-of-way, and plaintiff, a permissive licensee, was injured by the defendant's locomotive striking a scantling while backing, and throwing it upon him. *Held*, that the jury, by finding, under a proper instruction, that by the exercise of the care required of an ordinarily prudent man, under the circumstances, the plaintiff should have perceived the probability of the occurrence, necessarily found that plaintiff's negligence was the proximate cause of the injury. *Muse v. R. R.*, 443.

10. *Same—Concurrent Negligence.*—A railroad company does not owe the same degree of care in preventing an injury to a permissive licensee as it does to its passengers, or employees in the discharge of their duties; and if a railroad company and the permissive licensee on its right-of-way are both negligent, and the latter is injured and his negligence is concurrent with that of the railroad and continues up to the moment of the impact, the law attributes the injury to his negligence and not to that of the defendant. *Ibid.*

11. *Evidence—Nonsuit.*—Evidence tending to show that defendant railroad company negligently caused plaintiff to be thrown to the ground, and inflicted the injury complained of, while his train was on a siding at a regular station without apparent danger from approaching trains, and that he was acting under the instruction of his superiors in charge, or with their knowledge and approval, is not affected by the fact that he was not acting under a rule made for the protection of trains when on the main line, so as to raise the question of contributory negligence; and a judgment of nonsuit upon the evidence based on this contention is properly refused. *Meacham v. R. R.*, 147.

CONVERSION. See Wills, 4.

COPIES OF DEEDS. See Deeds and Conveyances, 36.

CORPORATIONS. See Municipal Corporations.

1. *Damnum Absque Injuria.*—When a person, corporate or individual, is doing a lawful thing in a lawful way, his conduct is not actionable, though it may result in damage to another, for no legal right has been invaded, and hence it is *damnum absque injuria. White v. Kincaid*, 415.

CORPORATIONS—*Continued.*

2. *Dissolution — Statute — Directors — Rights of Stockholders — Injunction.*—Revisal, sec. 1195, enters into every charter of a corporation subject to its provisions, and every stockholder in such corporation takes and holds his stock subject to the power of dissolution therein provided; and when the statutory provisions are complied with and the directors, acting in good faith and according to their best judgment for the interests involved, pass the resolution required, and it is concurred in by two-thirds in interest of the stockholders, it is only in rare and exceptional instances that their action should be stayed or interfered with by the courts. *Ibid.*

3. *Dissolution — Statute — Directors — Fiduciary Relationship.*—The directors of a corporation in proceedings for dissolution, under Revisal, sec. 1195, are trustees in the sense that they must act faithfully in their judgment for the benefit of the corporation and in furtherance of its interest, and not for the purpose of unjustly oppressing the holders of the minority stock, or to attain their own personal ends. *Ibid.*

4. *Dissolution — Statute — Injunction—Directors—Discretion.*—When a corporation lawfully proceeds to wind up its affairs in accordance with Revisal, sec. 1195, the motive prompting the act, however reprehensible or malicious, is not, as a rule, relevant to the inquiry; and the courts will not undertake to interfere with the honest exercise of discretionary powers vested by statute in the management of a corporation, however unwise or improvident it may seem in a given instance. *Ibid.*

5. *Dissolution — Statute — Rights of Stockholders — Injunction—Fraud.*—When it appears of record that a restraining order has been issued against the dissolution of a corporation, according to the provision of Revisal, sec. 1195, at the suit of a stockholder, and that there was no scheme or conspiracy on the part of the management or majority stockholders of the corporation to oppress the plaintiff, except an inference made by him from the fact that a dissolution was resolved upon; and that, though solvent, there was no available capital with which to resume business, and no prospect of mutual co-operation or eventual success, the restraining order should be dissolved. *Ibid.*

6. *Dissolution — Statutes — Questions for Court — Procedure.* — Upon the dissolution at the final hearing of an order restraining a manufacturing corporation from dissolving according to the provisions of Revisal, sec. 1195, in an action brought by a stockholder, when it appears that there are substantial issues involving the adjustment of corporate affairs arising

CORPORATIONS—*Continued.*

from the pleadings, especially as to indebtedness between the corporation and plaintiff and defendant, which will require decision by the Court, the proceedings referred to and contemplated by Revisal, sec. 1203, should be carried on and completed in the present action, and include such orders as to the disposition and sale of the plant as may be for the best interests of the assets and of the parties. *Ibid.*

COUNSEL, ARGUMENT OF. See Power of Court, 10; Instructions, 26.

COUNTY COMMISSIONERS.

1. *Stock Law—Territory—Boundaries.*—In pursuance of an election held under Revisal, sec. 1684, resulting in favor of the stock law, it is competent for the county commissioners to forbid stock from running at large within the county, and declare a mountain range, a creek, a fence, or other natural line, as the limit within which the law shall operate. *State v. Mathis*, 546.

2. *Same—Fence—Adjoining County.*—When the stock law is in force in a county, under the provisions of Revisal, sec. 1684, and the defendant, prosecuted for its violation, lives within a short distance from the dividing line of that and adjoining county wherein the stock law was not operated, and wilfully permits his stock to run at large, it is not a valid defense that no fence had been built on the line to prevent the stock from the adjoining county to run at large on his side of the line, when the county commissioners had declared the line to be a mountain range or other natural or political line. *Ibid.*

COURTS. See Equity, 3.

COVERTURE. See Husband and Wife, 5.

CREDIT AGENCY. See Partnerships, 1.

CROPS, ABANDONMENT OF. See Jurisdiction, 8.

CROSSINGS. See Railroads, 11.

CUMULATIVE EVIDENCE. See Evidence, 23.

CURRENCY. See Judgments, 2.

DAMAGES. See Measure of Damages.

1. *Contracts, Breach of—Present and Prospective—Procedure.*—When there has been a definite and absolute breach of a contract which is single and entire, all damages, both present and prospective, suffered by the injured party, may and

DAMAGES—*Continued.*

usually must be recovered in one and the same action. *Wilkinson v. Dunbar*, 20.

2. *Contracts, Breach of—Prospective Profits, When Recoverable.*—When prospective damages are allowed to the injured party as arising under a breach of contract, they must be such as are in reasonable contemplation of the parties and capable of being ascertained with a reasonable degree of certainty; and while profits prevented are frequently held to be excluded, they are those expected by reason of collateral engagements, or dependent to a great extent on the uncertainty of a trade and fluctuations of the market. *Ibid.*

3. *Contracts, Breach of—Prospective Profits, How Estimated.*—When an injured party to a contract is entitled to recover prospective damages, proper allowance should be made for the fact that recovery is had for damages that would have accrued at a future time, and the Courts and juries should see that such is made for those fluctuations, which are likely to occur. Where, however, the recovery is for the cutting and delivery at a certain price of several millions of feet of timber, a contract requiring years in its performance beyond the time when the breach was established, it was error in the trial Judge to instruct the jury, generally, that the measure of damages was the difference between the amount to be paid for the work and the cost of performance. This is correct as to damages already accrued, but, as to those to arise in the future, the rule should be the present value of such damages. *Ibid.*

4. *Contracts — Prospective Profits — Contemplation of Parties.* — Prospective profits are advantages which are the direct and immediate fruits of the contract entered into between the parties, are a part and parcel of the contract, and presumed to have been taken into consideration at the time it was made. *Ibid.*

5. *Witnesses—Expert Testimony as to Facts.*—Witnesses shown to be familiar with the tract of land, and lumbermen of experience having personal knowledge of the facts and conditions, may give their opinion as to the cost of cutting and delivering timber, and the profits per thousand feet, when the same is relevant to the inquiry in a suit for damages arising from a breach of contract. *Ibid.*

6. *Verdict—The Word "Dollars" Omitted—Judgment.*—When the jury, in response to an issue on damages, had answered the issue "five thousand," it was not error in the trial Judge to add the word "dollars" in rendering judgment, when the pleadings, the evidence, the nature of the case and contention

DAMAGES—*Continued.*

of the parties conclusively so indicated; and an exception taken thereto after the jury had been discharged cannot be upheld. *Cox v. R. R.*, 86.

7. *Same—Unit of Currency.*—When, to an issue in a suit for a demand for damages, the jury has answered in an amount, leaving off the word "dollars," the Judge may, in the judgment rendered, supply the word, for the dollar is the unit of our currency, in which the judgment is to be paid, and all other coins are recognized as multiples or fractional parts thereof. *Ibid.*

8. *Master and Servant — Safe Appliances — Negligence.* — In an action for damages for injuries received, alleged to have been the result of improper instruments given by the employer to the employee with which the latter was to do the work entrusted to him, the liability of the former, in damages, depends upon whether he was negligent in respect to the instrumentalities provided. *Cotton v. R. R.*, 227.

9. *Same—Proof Required.*—For the recovery of damages for injury alleged to have been caused to an employee by reason of the negligently furnishing by the employer improper implement with which he was to perform his work within the scope of his employment, the former, to establish his case, must show: (1) That the implement furnished by the master was, at the time of the injury, defective; (2) That the master knew of the defect, or was negligent in not discovering it and making needed repairs; (3) That the defect was the proximate cause of the injury. (In this case, the question as to the duty of the servant to inform the master of the defect did not arise upon the evidence). *Ibid.*

10. *Corporations—Damnum Absque Injuria.*—When a person, corporate or individual, is doing a lawful thing in a lawful way, his conduct is not actionable, though it may result in damage to another, for no legal right has been invaded, and hence it is *damnum absque injuria*. *White v. Kincaid*, 415.

DAMNUM ABSQUE INJURIA. See Condemnation Proceedings, 2; Damages, 10.

DANGEROUS SURROUNDINGS. See Evidence, 28.

DEATH BY WRONGFUL ACT. See Executors and Administrators, 2; Evidence, 27.

DEBTS. See Executors and Administrators, 2; Mortgagor and Mortgagee, 3.

DECEASED PERSONS. See Transactions with Deceased.

DECLARATIONS. See Evidence, 43, 53; Title, 1.

DEEDS AND CONVEYANCES.

1. *Title — Evidence — Common Source — Rule of Convenience.* — When both parties to a controversy involving the title to land claim under the same person, it is not competent for either, as such claimant, to deny that the common grantor had title. *McCoy v. Lumber Co.*, 1.

2. *Same.*—When the rule applies that parties claiming land under a common source are not required to show title beyond, it is not in strictness an application of the doctrine of estoppel, precluding a party from showing and establishing title superior to that of the common source and connecting himself with it; but the rule is established for the convenience of parties, relieving each from the necessity of proving title back of the common source when it is perfectly apparent that both of them are acting in recognition of that title as the true one. *Ibid.*

3. *Same—Timber—Deeds.*—When, in an action for spoil and wrong to the land, the owner of the common source of title holds a deed purporting to convey to him the fee in lands, or he is in possession thereof claiming to own them, and then conveys a restricted interest therein, in this case the right to cut and remove therefrom timber of specified size, the grantee of the restricted interest cannot deny the title of the common source, so as to make it necessary for the grantor to show his title beyond, in order to recover. *Ibid.*

4. *Same.*—Plaintiff and his grantor were in possession under deed of certain lands claiming them as absolute owners, one as reversioner and the other as life tenant. They conveyed to one of the defendants the right to cut and remove from the lands the timber of a specified size, who, in his turn, and after the death of the life tenant, entered into contract with the other defendant to cut and remove the timber for them. Thereafter, the plaintiff brought suit for damages arising from defendant's spoil and wrong to the land. *Held*, that, as according to his own deed, in evidence, the plaintiff was the owner of the lands, claiming them as his own, it was not necessary for him to prove his title further, in order to recover damages in a suit against those to whom he had conveyed the restricted estate. *Ibid.*

5. *Reformation—Evidence—Questions for Jury.*—In an action to correct or reform a written instrument, when there is more than a scintilla of evidence, it is for the jury, and not the Court, to say whether the evidence is clear, cogent and convincing. *Cuthbertson v. Morgan*, 72.

DEEDS AND CONVEYANCES—*Continued.*

6. *Reformation—Equitable Relief—Covenants—Support—Charge on Land.*—Defendant executed a note, and to secure it executed a mortgage on his land. Thereafter, he entered into a written contract with plaintiff to convey to him a remainder in interest in one-half the land, upon condition that he would pay off the note and mortgage in small annual instalments; and if, at the time the mortgagee demanded payment, the plaintiff could not meet it, he would find some one to carry it, in which event defendant and his wife were to "renew the note and mortgage." Upon the payment of the note and mortgage or any renewal or renewals thereof, the defendants were to execute a deed to the land, reserving a life estate. The plaintiff paid a small amount on the debt and, being forced to do so, borrowed the balance and called upon defendants to join with him in securing it by mortgaging the land, and instituted action upon their refusal. Upon allegation and proof, defendants, by the verdict of the jury, engrafted a parol contract upon the written one, that, in addition, the plaintiff was to take care of defendants during life and see that they did not suffer. *Held,* (1) That as plaintiff, after the verdict, asked for a decree for reformation and specific performance, he is entitled in equity to have the defendants execute the mortgage in renewal, or substitution; (2) That the agreement of support, etc., is a covenant and not a condition precedent; (3) That defendants' support, or an amount reasonably sufficient therefor, in their condition in life, should be fixed and made a charge on the land; (4) That, if so desired, a reference should be had to ascertain what, if anything, is due on account of defendants' support in the past. *Ibid.*

7. *Undue Influence — Evidence — Questions for Jury.*—Upon evidence tending to show that the grantor of a deed was not a provident or industrious man, that he was addicted to drink and was, at times, but not usually, incapable of attending properly to his business, and that usually he managed his own affairs, made contracts, executed deeds, etc., and that he was sober and clothed in his right mind at the time he executed the deed in question, the verdict of the jury that the deed in question was not obtained through undue influence will not be disturbed on appeal. *Myatt v. Myatt,* 137.

8. *Undue Influence—Evidence—Fraud.*—While undue influence sufficient to set aside a deed does not necessarily include moral turpitude, or even an improper motive, yet, when the deed is the result of a dominant influence exercised over the mind of the grantor by another, so that the mind of the

DEEDS AND CONVEYANCES—*Continued.*

grantor is suppressed or supplanted and the deed expresses the will of the actor producing the result, the deed so obtained is not improperly termed fraudulent. *Ibid.*

9. *Undue Influence—Witnesses—Evidence Impeaching—Opinion of Mental Condition—Hearsay Evidence.*—In an action to set aside a deed for undue influence, a party asked his own witness to give his opinion of the mental condition of the grantor's mind during the period of several weeks just prior to the execution of the deed. He had previously stated he did not know what his condition was. The Court, in its discretion, refused to allow the witness to answer. *Held*, no error for that (a) It would, to some extent, permit the party to cross-examine his own witness; (b) The answer to the subsequent question could only have been a conclusion or inference from hearsay, or the opinion of others, taking it without the rule that such opinion, to be competent, must come from the association or personal observation of the witness himself. *Ibid.*

10. *Undue Influence of Third Persons—Relief Granted.*—If a deed is procured by the fraud or undue influence of one acting as agent of the grantee therein; or if the grantee in such deed was a volunteer or bought with notice of the wrong done, or of facts sufficient to put a man of average business prudence on inquiry that would lead to knowledge, the grantor is entitled to adequate and proper relief. *Beeson v. Smith*, 142.

11. *Same—Instructions.*—In an action to set aside a deed to lands alleged to have been procured by fraud or undue influence, there was evidence tending to show, that the defendant (grantee) and plaintiff (grantor) were brother and sister, and the latter executed to the former a deed reciting a valuable consideration of $10, with stipulations that he was to take care of her, look after her affairs during life and provide a suitable burial for her body at her death; that in return for this service he was to have and own all of her personal property owned at the time of her death; that she was not of sufficient mental capacity to make the deed, and that it was procured by fraud and undue influence of a nephew by marriage, who had for some time previously lived on her land. *Held*, it was error in the trial Judge to charge the jury, in effect, that for the sister, the plaintiff, to recover, she must establish, by proper proof, that the execution of the instrument in question had been procured by the fraud or undue influence of the defendant, or that the defendant was a party to it. *Ibid.*

12. *Fraud—Transactions With Deceased Persons—Place of Signing—Harmless Error.*—When there is no controversy as to

DEEDS AND CONVEYANCES—*Continued.*

the fact, and it is immaterial to the issue and non-prejudicial, where the deceased was when he signed a deed, in an action attacking its validity for fraud, admission of evidence that it was signed in bed is not reversible error, upon the ground that the testimony concerned a transaction between the witness and the deceased. *Smith v. Moore*, 185.

13. *Evidence—Declarations Explanatory of Possession—Res Gestae.*—While the issue of fraud is one to be passed upon by the jury, in an action wherein the validity of a deed is attacked on that ground, declarations that the deed was procured by fraud, when qualifying and explaining the possession and made by the party in possession of the lands claiming them as his own at the time demand therefor was made, are competent as a part of the *res gestae*, the fact of possession, though incompetent as evidence of the alleged fraudulent fact, or as an opinion of how the deed was obtained. *Ibid.*

14. *Habendum—Remainder—Construction.*—While a stranger to a deed cannot be introduced in the habendum clause to take as a grantee, he can therein take in remainder by way of limitation, when, by construction of the entire instrument, it appears that the intention of the parties is given effect. An estate to D., "her heirs and assigns" in the premises; habendum, to hold, "to her," the said D., during her natural life, and at her death to the heirs of S. *Held;* the deed, construed in its entirety, conveyed only a life estate to D. with limitation over in accordance with the terms of the habendum clause. *Condor v. Secrest*, 201.

15. *Deceased Persons, Transactions With—Title Claimed—Declarations.*—When deceased has had no interest in the lands in dispute, but was simply an assignee of a purchaser thereof and made a deed in accordance with directions given, evidence of his declarations and directions respecting the manner in which the deed was to have been drawn does not come within the prohibition of Revisal, sec. 1631, involving transactions and communications with deceased persons, as no claim of title is made under him. *Ibid.*

16. *Conveyances to Heirs of Living Person—Children.*—An estate granted to D. for life and then to the heirs of S., who was then alive, is operative as to the conveyance of the remainder under Revisal, sec. 1583, which construes the word "heirs" to mean children, in such instances. *Ibid.*

17. *Principal and Agent—Independent Purpose—No Question of Agency.*—When a person is acting upon his own intention, and thereby effectuates a conveyance to D. for life and then

DEEDS AND CONVEYANCES—*Continued.*

to his own children, no question as to his acting as the agent of D. is presented. *Ibid.*

18. *Jurisdiction—Mistake of Law—Courts of Equity.*—The courts of equity have jurisdiction to correct a deed to effectuate the intention of the parties, wherein it appears, from the construction of the entire instrument and from the action of the parties, that there has been a mistake of law. *Ibid.*

19. *Husband and Wife—Heirs of Wife—Second Wife's Dower.*—When land has been conveyed to husband and wife, omitting the word "heirs" after the names of the grantees, then to the wife by name, and heirs, the wife of a second marriage cannot claim dower after the death of the husband in the lands so conveyed, as only a life estate passed to the husband and the fee to the first wife, which, without testamentary disposition, would pass to her heirs. *Sprinkle v. Spainhour*, 223.

20. *Husband and Wife—Heirs of Wife—Estate Conveyed.*—A deed to a husband and wife, and only to the heirs of the latter, does not pass the fee to the former by virtue of Revisal, sec. 946, for as to him it is plainly intended that the grantor meant to convey an estate of less dignity. *Ibid.*

21. *Husband and Wife—Wife's Estate—Right of Survivorship.*—When deeds are mutually given among the heirs-at-law to effect a partition of lands descended to them, and one of them is to a married woman whose husband is jointly named therein, but not jointly entitled, the doctrine of the rights of survivorship does not apply; and it matters not if the deed was made at the wife's request, because she is presumed to have acted under his coercion. *Ibid.*

22. *Wills—Trusts and Trustees—Descriptive Words—Estate.*—A devise to N. of all the residue of testator's estate in trust to receive, hold, invest and reinvest, evidences the purpose of the testator to embrace therein both real and personal property. (*Foil v. Newsome*, 138 N. C., 115, cited and approved). *Powell v. Wood*, 235.

23. *Wills — Executor and Administrator — Trusts and Trustees — Power to Convey Implied.*—When a power is given a trustee under a will to receive, hold and invest and reinvest, the estate of his testator, including lands, which is consistent with the other terms of the will, it confers the authority to sell the lands and make valid title thereto. *Ibid.*

24. *Parol Evidence — Locating Calls — Questions for Jury.* — The description in a deed conveying a town lot as follows: "Beginning at a stake on W. street, said town, 27 feet 6 inches from N. W. corner of C. T. B. lot, on the same street, and

DEEDS AND CONVEYANCES—*Continued.*

runs N. 41, W. about 25½ feet to Sycamore street; thence with Sycamore street S. 48, W. 117½ feet; thence S. 41, E. about 25½ feet," etc., is adequate and sufficient, and where, in connection with such deed, there is testimony to the effect "that plaintiff had built his present brick store along Sycamore street and fronting Wall street, and the wall of such store above the ground was seven inches into Sycamore street, and this infringement on Sycamore street had been satisfactorily adjusted with the town authorities," this evidence furnished data from which the second corner called for in plaintiff's deed, to-wit: the intersection between Wall and Sycamore streets, could be given a physical placing, to-wit: at a point seven inches short of the wall of the brick store, and required that the question of the correct location of plaintiff's deed should be submitted to the jury. *Hanstein v. Ferrall*, 241.

25. *Boundaries—Recognition—Acquiescence.*—Recognition of and acquiescence in a line by the owners and occupants of adjoining lots as the true boundary line, is evidence of the true boundary line in cases when the correct divisional line is not otherwise clearly defined and established. *Ibid.*

26. *Same—Nonsuit.*—While recognition of and acquiescence in a division line may not, as a rule, justify a departure from the true dividing line, when otherwise clearly established, when it is not so established, and plaintiff claims that defendant has built beyond it upon his land, evidence on the question of boundary is sufficient to go to the jury which tends to show, that upon each of the adjoining lots of plaintiff and defendant there had formerly been two wooden stores, subsequently destroyed by fire, so close together that their eaves had the same drip, causing the same trench on the ground by waters falling from them; that, to ascertain the correct dividing line, plaintiff had measured the distance between the brick pillars along the middle of the line caused by the common drip, and that the brick building then constructed by him without objection from defendant's grantor, had its walls on his own land twelve inches back from the line as ascertained; and in such case an order of nonsuit for want of any evidence of location was erroneous. *Ibid.*

27. *Description—Parol Evidence.*—A deed conveying a tract of land under the description: "A certain tract or parcel of land lying and being in the county aforesaid, fronting the farm of C. W. Taylor, adjoining the farm of T. H. Robinson, and others, and known as the B. H. Taylor place, being 150 acres more or less," is sufficiently definite to permit the reception

DEEDS AND CONVEYANCES—*Continued.*

of parol testimony to fit the description to the property, and it was further competent to show by such testimony that the father of defendant, and grantee in the deed, had constituted thirty additional acres, being the *locus in quo*, as a part of the B. H. Taylor place for the purposes of the deed, and that the same was included within the descriptive terms of the instrument. *Grimes v. Bryan*, 248.

28. *Adverse Possession — Title — Instructions.* — When plaintiff claims the land by adverse possession, and the defendant claims as grantee of a purchaser at a sale under a mortgage given by plaintiff, which claim plaintiff resists upon the ground that the description in the mortgage does not cover the *locus in quo*, it is not to plaintiff's prejudice for the trial Judge to charge, in effect, that, if the plaintiff was in possession of the land for twenty years and held it openly and adversely within known and visible lines and boundaries, and had never conveyed the same, it would ripen the title in him. *Ibid.*

29. *Proceedings for Division of Lands—Commissioners' Report—Original Papers—Burnt Records—Recording Report.*—When a paper purporting to be an original report of a division of lands, in correct form and signed by the several commissioners, under seal, but which has never been registered, is presented to the Clerk of the court after the court-house has been burned and the records destroyed, with an entry thereon shown to be in the handwriting of a deceased former clerk, that the commissioners made the report in open court, and that the report was confirmed and ordered to be recorded, it is the duty of the Clerk, after satisfying himself upon evidence that the report is the original one, and that the entry is in the handwriting of the former clerk, to have the report recorded, even against the objection of a party in interest, in the absence of suggestion of fraud or that the report was not genuine. *Hill v. Lane*, 267.

30. *Same—Certificate—Color of Title.*—When, after the records of the court have been destroyed by fire, a paper, appearing to be the original report of commissioners to divide lands, with an entry ordering registration made by a former clerk, and which has not before been registered, is recorded by the Clerk and registered, after having satisfied himself of its being the original and genuine, an allotment of a part of the land therein is color of title as to that tract, and a certified copy is competent evidence in an action involving that question. *Ibid.*

31. *Color of Title—Commissioners' Report—Recording—Presumption.*—When a certified copy of a report of commissioners to

DEEDS AND CONVEYANCES—*Continued.*

divide land is put in evidence as color of title, by a party in interest claiming a part of the land therein described, it must be presumed, in the absence of proof to the contrary, that the paper was duly recorded in accordance with an order directing it. *Ibid.*

32. *Adverse Possession — Color of Title — Evidence — Nonsuit.* — When adverse possession of the land in question for more than seven years under a deed to a married woman is shown as color of title, and an ouster and continuous adverse possession of a part of the land contained in the description is shown during her coverture, and it further appears that the husband was entitled as tenant by the courtesy, and held possession after her death, to within two years next preceding the time of trial, and that the plaintiffs, the heirs-at-law, have had possession since then, the evidence is sufficient to carry the case to the jury, and a judgment as of nonsuit upon the evidence was properly disallowed, when title out of the State has been admitted. *Ibid.*

33. *Wills — Estates — Tenant for Life — Betterments, Recovered When.*—A claim for betterments may be set up by way of answer and recovered by the defendant, a grantee for value of a tenant for life in a deed conveying the fee, in an action to recover possession by the remainderman, when it appears that the life tenant, now deceased, held under a devise in a will under such terms or expression as to leave it uncertain whether the devise was of a life estate or the fee, and when the defendant made the improvements at a time he believed, and had good reason to believe, that he was the true owner. *Faison v. Kelly*, 282.

34. *Same Evidence—Questions for Jury.*—When there is evidence that defendant had been in possession of lands, asserting absolute ownership for more than thirty years, under a deed conveying to him a title in fee, executed by a devisee thereof and by a trustee named in the will, and had put permanent improvements thereon; that the land had been bought and paid for by defendant, and the deed taken under advice of counsel learned in the law, that the deed conveyed the true title; that the lower Court construed the will to convey the fee, but was overruled by the Supreme Court, holding that only a life estate was devised, and that the remainderman was entitled to the possession as the owner of the fee. *Held*, the evidence is relevant to the inquiry, and the claim for betterments should be submitted to the jury. (*Merritt v. Scott*, 81 N. C., 385, cited and distinguished). *Ibid.*

35. *Calls—Boundaries—Parol Evidence.*—When it is pertinent to the inquiry, in an action for the possession of lands, as tend-

DEEDS AND CONVEYANCES—*Continued.*

ing to establish a call in a deed under which one of the parties to the action claims, it is competent for a witness to testify that he had heard one of the natural boundaries called by the name mentioned in the deed. *McNeely v. Laxton*, 327.

36. *Burnt and Lost Records—Proceedings—Copies of Deeds—Estoppel.*—Plaintiff claimed title to the land in controversy by virtue of a deed to his ancestor T. and seven years' adverse possession. Defendant put in evidence the record of proceedings to restore a burnt or lost record, under Code, sec. 56 (Revisal, 328), brought by M., under whom he claimed, against T., to estop plaintiff from denying the location of the boundaries ascertained and declared by the Court therein. *Held*, (1) Plaintiff is not estopped by that record from proving title to the land, or from showing its true boundaries, the copies having only the same force and effect as the lost or destroyed deeds and records would have had, if produced. *Ibid.*

37. *Boundaries—Annexed Plat—Evidence.*—When the length of a boundary line of land is not given in the conveyance, but is given in an annexed plat, the jury may consider the distance as specified in the plat in locating that line. *Ibid.*

38. *Boundaries—Evidence—Questions for Jury.*—In an action involving the title to lands, when the controversy is dependent upon the true location of lands described in a certain grant, the jury are not confined, necessarily, in their inquiry, to the location of the lines of other tracts called for in the grant, which are not themselves located. (*Moore v. McClain*, 141 N. C., 479, cited and approved). *Ibid.*

39. *Pleadings — Description — Identity.*—When the description of the boundaries of the land in controversy, as set out in the complaint, corresponds with that given in a certain conveyance or grant upon which the plaintiff's right of recovery is made to depend, and a witness has testified as to the identity of a part of the lands, there is some evidence to sustain the plaintiff's right to recover at least a part of the lands described in the complaint. *Ibid.*

40. *Controlling Calls.*—A definite call in a deed or grant for a corner or line of an adjoining tract of land, which is known and established, will control the course and distance, unless it is made to appear that, with a view of making the deed, and by physical survey, a different corner was established, or a different line was actually run and marked, and the instrument was executed by the grantor with the intent, at the time, to convey the land according to this actual survey. *Mitchell v. Welborn*, 247.

DEEDS AND CONVEYANCES—*Continued.*

41. *Same—Misleading Instructions.*—Where the right of the parties depended on the correct location of a grant to J. W., and this grant for its beginning corner called for a W. O. and gum, the beginning corner of grant to Benjamin Johnston, and there was evidence on the part of defendant tending to fix this corner of the Johnston grant at "A," it was reversible error to charge the jury that "they should locate the grant to Benjamin Johnston, if they could, and use the evidence thereon to aid them in locating the James Welborn grant." For if the corner of the Johnston grant, called for as the beginning course of the Welborn grant, was fixed and established, its correct location, on the facts presented, would fix and control the location of the beginning corner of the Welborn grant, and the jury should have been so instructed. *Ibid.*

42. *Delivery to Third Party—Conditional Delivery—Presumption—Evidence—Rebuttal.*—The execution and delivery of a deed by the maker to a third person must be accompanied by unqualified instruction to deliver, to make such delivery effectual; and when the testimony of the subscribing and only witness tends but to show that the maker signed the deed and gave it to a third person with instruction to deliver it to the proper person if he never called for it, and that it was not delivered to the grantee in the lifetime of the maker, the presumption of delivery from the unexplained possession of the grantee and its registration is rebutted. *Fortune v. Hunt*, 358.

43. *Delivery to Third Party—Conditional Delivery—Death—Revocation.*—When the maker of a deed gives it to a third person to deliver, but qualifies his instructions so as to retain control over it, and dies while this condition exists, in law his death revokes the authority thus given; otherwise, when the delivery is complete in grantor's lifetime, for then it relates back to the time of its delivery to the third person. *Ibid.*

44. *Delivery Essential—Intent.*—The actual delivery is essential in law to the validity of a deed, and in its absence the intention of the grantor will not be considered. *Ibid.*

45. *Delivered to Third Party—Presumptive Evidence—Burden of Proof—Verdict Directing—Questions for Jury.*—The presumption is that a deed duly proven was executed and delivered at the time it bears date. The burden of proof is upon the party seeking to attack its validity to show the contrary. Therefore, the Court erred in directing a verdict, but should have submitted the issue to the jury with appropriate instruction. *Ibid.*

46. *Grantor in Possession—Subsequent Deed—Adverse Possession.*—A grantor in a deed may afterwards acquire title to the

DEEDS AND CONVEYANCES—*Continued.*

land therein conveyed by purchase or adverse possession, good against his grantee and those claiming under him. *Chatham v. Lansford*, 363.

47. *Grantor in Possession — Subsequent Deed — Color of Title — Adverse Possession.*—When a grantor of a deed remaining in possession subsequently purchases from another the land described therein, and takes a deed therefor to himself, the second deed is color of title which open, notorious, continuous adverse possession may ripen into a perfect title against all persons not under disability. *Ibid.*

48. *Same — Entry and Ouster — Estoppel — Adverse Possession.*—Every entry on land is presumed to be under such title as the party thus in possession holds; and when a grantor in a warranty deed remains in possession of lands, afterwards purchases the same from a third person, takes deed therefor to himself, and claims the right of possession thereunder, the fact of his thus taking the deed amounts to an entry and ouster, and he is not estopped from asserting title by adverse possession because of the covenant of warranty in his deed. *Ibid.*

49. *Construction—Formal Parts—Intent of Grantor.*—The whole of a deed should be so construed as to effectuate the plainly expressed intention of the grantor, and so as to prevent the technicalities of the common law rule of construction, now obsolete, which regards the granting clause and the habendum and tenedum as separate and independent, each having its own special functions, from overriding the intention so expressed. *Triplett v. Williams*, 394.

50. *Same—"Heirs"—Limitation in Habendum.*—The premises of a deed to land read, among other things, "unto said M. G., her heirs and assigns"; and the habendum, "to herself, the said M. G. during her life time, and at her death said land is to be equally divided between" her children. *Held*, (1) Since under the Act of 1879, now Revisal, sec. 946, the same estate would have passed if the word "heirs," an established formula, had been omitted in the granting clause, there is no repugnance in this deed between the granting clause and habendum; (2) The limitation of the estate in the habendum, and the creation of an estate in remainder therein, were conclusive proof that there was no intention of the grantor to create an estate in fee, but an estate for life to M. G. with a remainder over to her children. *Ibid.*

51. *Contracts to Convey Lands—Equity—Parties—Imperfect Title.*—Specific performance of a contract to convey an indefeasible title to lands will not be enforced in equity against a

DEEDS AND CONVEYANCES—*Continued.*

purchaser, at the suit of one having the life estate, when those in remainder have not been made parties and would not be bound by the decree. *Ibid.*

52. *Contracts to Convey—Equity—Fraud or Mistake—Reasonable Relief.*—When the defense to an action for specific performance to convey land is that, as a part of the consideration for the contract, entering into the treaty and forming part of the negotiations, the plaintiff was to give defendant an option on another tract of land, which was not done, the contention does not necessarily involve an allegation of fraud or intentional wrong, but in this case only the question of a reasonably well grounded belief on defendant's part that the option was to be given. *Rudisill v. Whitener*, 439.

53. *Contracts to Convey — Treaty — Negotiations — Written Contract—Parol Evidence—Fraud or Mistake.*—When the written contract to convey lands sued on is admitted to have been signed as written, but the defense is that specific performance should not be decreed, on the ground that the defendant was induced to enter into it by the promise of the plaintiff to transfer to him a certain option on another tract of land he held, which was not done, parol evidence of all the facts and circumstances surrounding the treaty and entering into the negotiation is competent, not to correct the writing, but to enable the Court to ascertain whether there was any element of mistake or unfair advantage in the transaction taken by the party seeking equitable relief. *Ibid.*

DEFECT. See Negligence, 12.

DEFECTIVE EXECUTIONS. See Executions, 2, 3.

DEFENDANT A WITNESS. See Witnesses, 5, 6, 7.

DEFENSE. See Pleadings, 9, 15; Pardons, 2; Insanity, 1, 2, 3.

DELIVERY. See Deeds and Conveyances, 42, 43, 44, 45; Pardons, 4, 5, 6.

DELIVERY OF DEED. See Principal and Agent, 1.

DEMAND IN WRITING. See Penalty Statutes, 1.

DEMURRER.

1. *Pleadings—Amendments — Acquiescence—Practice.*—When the trial Judge sustains a demurrer to the complaint upon the grounds that two or more defendants were improperly joined in an action, to which plaintiff does not except, but obtains leave and amends the complaint to meet the views of the

DEMURRER—*Continued.*

Court, he acquiesces in the judgment upon demurrer and will not be permitted to assign it for error upon an appeal. The better practice would be a request that the action be divided and tried separately. *Rice v. McAdems*, 29.

2. *Carriers of Passengers — Pleadings — Principal and Agent — Scope of Authority—Ticket Agents.*—A motion to dismiss upon the complaint should be denied, when it is alleged that plaintiff, through her agent, bought of defendant railroad company's agent at its station, S., a ticket from K. to S. under contract that the plaintiff at K. was to be notified at once thereof by defendant's agents, which was not done within six days, through the defendant's carelessness and negligence, whereby plaintiff, who had no money with her, was unduly delayed to her great damage. *Reeves v. R. R.*, 244.

3. *Pleadings - Joinder of Actions — Misjoinder—Defense by Answer.*—When it appears, both by the summons and Justice's return, in an action brought in his court, that the plaintiff alleged a joint demand against the several defendants, a demurrer of defendants in the Superior Court for misjoinder of separate actions will not be sustained, as the allegations of the complaint must be taken as true, and such defense should be by way of answer. Revisal, sec. 477. *Laney v. Hutton*, 265.

DESCRIPTIONS. See Deeds and Conveyances, 27.

DESCRIPTIVE WORDS. See Estates, 1; Deeds and Conveyances, 39.

DEVISEE AND HEIR. See Estoppel, 1.

DIRECTORS. See Corporations, 2, 3, 4.

DIRECT PROCEEDINGS. See Procedure, 6.

DISCRETION. See School Committee, 1; Municipal Corporations, 9, 10.

DISCRETIONARY POWERS. See Municipal Corporations, 7, 8.

DISCRETION OF COURT. See Appeal and Error, 1, 11, 19, 20; Power of Court, 1, 4, 5, 6, 7, 8, 9, 11, 12.

DISSOLUTION. See Corporations, 2, 3, 4, 5, 6.

DISTURBANCE. See Religious Meetings.

DIVERTING STREAM. See Water and Water Courses, 1.

DIVORCE. See Marriage and Divorce.

DOCKETING. See Partition, 2.

"DOLLARS." See Judgments, 2.

DOWER OF SECOND WIFE. See Husband and Wife, 1.

DRUNKENNESS. See Evidence, 16.

DUE PROCESS. See Constitutional Law, 7.

DUTY OF EMPLOYER. See Master and Servant, 1, 6.

EARNINGS. See Evidence, 29.

ELECTION.

1. *Mortgagor and Mortgagee — Executors and Administrators — Purchaser at His Own Sale—Estoppel of Devisee and Heir—Ratification—Questions for Jury.*—A mortgaged land to B., who, upon A.'s death, qualified as his administrator. B. sold the land pursuant to the power contained in the mortgage and procured C. to buy it. C. executed a deed to B., who charged himself, in his final account, as administrator, with the amount of the bid made by C. B. devised to D., the heir of A., a portion of the land, who, during infancy and while under coverture, entered upon the land devised to her. Thereafter she brought this action, treating the sale under the mortgage as void and offered to redeem. *Held*, (1) That the sale was voidable at the election of the heir of A. (2) That taking possession of the land devised to D. did not, as a matter of law, make an election, estopping her from the enforcement of her legal or equitable rights. (3) Whether her conduct amounted to a ratification was, in the light of the evidence, a question for the jury. His Honor's instructions upon the issue approved. *Rich v. Morisey*, 37.

EMPLOYER AND EMPLOYEE. See Master and Servant.

ENTIRE INSTRUMENT. See Wills, 2.

ENTIRETY. See Estates, 7.

ENTRY AND OUSTER.

Estoppel—Adverse Possession.—Every entry on land is presumed to be under such title as the party thus in possession holds; and when a grantor in a warranty deed remains in possession of lands, afterwards purchases the same from a third person, takes deed therefor to himself, and claims the right of possession thereunder, the fact of his thus taking the deed amounts to an entry and ouster, and he is not estopped from asserting title by adverse possession because of the covenant of warranty in his deed. *Chatham v. Lansford*, 363.

EQUITABLE JURISDICTION. See Equity, 3.

EQUITABLE RELIEF. See Deeds and Conveyances, 5, 6.

EQUITY.

1. *Issues—Questions of Fact—Jurisprudence—Facts Established.*—While issuable facts, as distinguished from those which are evidentiary, must ordinarily be found by a jury, when the equity jurisdiction of the Court has been invoked, the Court will not grant a new trial when it appears that all of the essential facts upon which the rights of the parties depend are established by the pleadings or have been found by the jury. *Rich v. Morisey*, 37.

2. *Jurisdiction — Deeds and Conveyances — Mistake of Law — Courts.*—The courts of equity have jurisdiction to correct a deed to effectuate the intention of the parties, wherein it appears, from the construction of the entire instrument and from the action of the parties, that there has been a mistake of law. *Condor v. Secrest*, 201.

3. *Courts — Equitable Jurisdiction — Wills, Interpretation of.* — The courts of equity have jurisdiction in matters of the construction of wills involving the administration of trusts, and when devises and legacies are so blended and dependent on each other as to make it necessary to construe the whole to determine the respective rights of the beneficiaries. *Haywood v. Trust Co.*, 208.

4. *Judgments — Irregularities — Lack of Parties.* — A final judgment of a Court having jurisdiction of the parties and subject matter will not be set aside for irregularities, when it appears that all of the parties in interest are not before the Court so that the equities may be administered and full and complete justice done. *Lanier v. Heilig*, 384.

5. *Contracts to Convey Lands—Parties—Imperfect Title.*—Specific performance of a contract to convey an indefeasible title to lands will not be enforced in equity against a purchaser, at the suit of one having the life estate, when those in remainder have not been made parties and would not be bound by the decree. *Triplett v. Williams*, 394.

6. *Deeds and Conveyances—Contracts to Convey—Fraud or Mistake—Reasonable Relief.*—When the defense to an action for specific performance to convey land is that, as a part of the consideration for the contract, entering into the treaty and forming part of the negotiations, the plaintiff was to give defendant an option on another tract of land, which was not done, the contention does not necessarily involve an allegation of fraud or intentional wrong, but in this case only the question of a reasonably well grounded belief on defendant's part that the option was to be given. *Rudisill v. Whitener*, 439.

EQUITY—*Continued.*

7. *Deeds and Conveyances—Contracts to Convey—Treaty—Negotiations—Written Contract—Parol Evidence—Fraud or Mistake.*—When the written contract to convey lands sued on is admitted to have been signed as written, but the defense is that specific performance should not be decreed, on the ground that the defendant was induced to enter into it by the promise of the plaintiff to transfer to him a certain option on another tract of land he held, which was not done, parol evidence of all the facts and circumstances surrounding the treaty and entering into the negotiation is competent, not to correct the writing, but to enable the Court to ascertain whether there was any element of mistake or unfair advantage in the transaction taken by the party seeking equitable relief. *Ibid.*

ERROR. See Notice, 5, 6.

ESTATES.

1. *Wills—Trusts and Trustees—Deeds and Conveyances—Descriptive Words.*—A devise to N. of all the residue of testator's estate in trust to receive, hold, invest and reinvest, evidences the purpose of the testator to embrace therein both real and personal property. (*Foil v. Newsome*, 138 N. C., 115, cited and approved). *Powell v. Wood*, 235.

2. *Wills—Property Passed.*—Unless the contrary intent appears, the disposition by the testator in his will of the residue of his estate, will pass both real and personal property. *Ibid.*

3. *Wills—Intention—Presumption—All Property.*—The presumption is, that a testator intended by his will to dispose of all his property, and not to die intestate as to any part of it. *Ibid.*

4. *Wills—Tenant for Life—Deeds and Conveyances—Betterments, Recovered, When.*—A claim for betterments may be set up by way of answer and recovered by the defendant, a grantee for value of a tenant for life in a deed conveying the fee, in an action to recover possession by the remainderman, when it appears that the life tenant, now deceased, held under a devise in a will under such terms or expression as to leave it uncertain whether the devise was of a life estate or the fee, and when the defendant made the improvements at a time he believed, and had good reason to believe, that he was the true owner. *Faison v. Kelly*, 282.

5. *Same—Evidence—Questions for Jury.*—When there is evidence that defendant had been in possession of lands, asserting absolute ownership for more than thirty years, under a deed conveying to him a title in fee, executed by a devisee thereof

ESTATES—*Continued.*

and by a trustee named in the will, and had put permanent improvements thereon; that the land had been bought and paid for by defendant, and the deed taken under advice of counsel learned in the law, that the deed conveyed the true title; that the lower Court construed the will to convey the fee, but was overruled by the Supreme Court, holding that only a life estate was devised, and that the remainderman was entitled to the possession as the owner of the fee. *Held*, the evidence is relevant to the inquiry, and the claim for betterments should be submitted to the jury. (*Merritt v. Scott*, 81 N. C., 385, cited and distinguished). *Ibid.*

6. *Husband and Wife—Entirety—Right of Survivorship—Timber—Proceeds of Sale.*—When, after marriage, a husband and wife derive title to land jointly, they are seized of the entirety—that is, *per tout, et non per my*, and neither is entitled to a division thereof by partition proceedings, or of money derived as proceeds of a voluntary sale of timber cut therefrom, as a matter of right. *Jones v. Smith & Co.*, 318.

7. *Same—Married Women—Constitutional Law.*—The provisions of the Constitution, relating to married women, makes no change in the estate in lands by husband and wife in entirety, or the right of survivorship therein. *Ibid.*

ESTOPPEL.

1. *Mortgagor and Mortgagee—Executors and Administrators—Purchaser at His Own Sale—Devisee and Heir—Ratification—Questions for Jury.*—A mortgaged land to B., who, upon A.'s death, qualified as his administrator. B. sold the land pursuant to the power contained in the mortgage and procured C. to buy it. C. executed a deed to B., who charged himself, in his final account, as administrator, with the amount of the bid made by C. B. devised to D., the heir of A., a portion of the land, who, during infancy and while under coverture, entered upon the land devised to her. Thereafter she brought this action, treating the sale under the mortgage as void and offered to redeem. *Held*, (1) That the sale was voidable at the election of the heir of A. (2) That taking possession of the land devised to D. did not, as a matter of law, make an election, estopping her from the enforcement of her legal or equitable rights. (3) Whether her conduct amounted to a ratification was, in the light of the evidence, a question for the jury. His Honor's instructions upon the issue approved. *Rich v. Morisey*, 37.

2. *Deeds and Conveyances—Burnt and Lost Records—Proceedings—Copies of Deeds.*—Plaintiff claimed title to the land in

ESTOPPEL—*Continued.*

controversy by virtue of a deed to his ancestor T. and seven years' adverse possession. Defendant put in evidence the record of proceedings to restore a burnt or lost record, under Code, sec. 56 (Revisal, 328), brought by M., under whom he claimed, against T., to estop plaintiff from denying the location of the boundaries ascertained and declared by the Court therein. *Held*, (1) Plaintiff is not estopped by that record from proving title to the land, or from showing its true boundaries, the copies having only the same force and effect as the lost or destroyed deeds and records would have had, if produced. *McNeely v. Laxton*, 327.

3. *Entry and Ouster—Adverse Possession.*—Every entry on land is presumed to be under such title as the party thus in possession holds; and when a grantor in a warranty deed remains in possession of lands, afterwards purchases the same from a third person, takes deed therefor to himself, and claims the right of possession thereunder, the fact of his thus taking the deed amounts to an entry and ouster, and he is not estopped from asserting title by adverse possession because of the covenant of warranty in his deed. *Chatham v. Lansford*, 363.

EVIDENCE.

1. *Deeds and Conveyances—Title—Common Source—Rule of Convenience.*—When both parties to a controversy involving the title to land claim under the same person, it is not competent for either, as such claimant, to deny that the common grantor had title. *McCoy v. Lumber Co.*, 1.
2. *Same.*—When the rule applies that parties claiming land under a common source are not required to show title beyond, it is not in strictness an application of the doctrine of estoppel, precluding a party from showing and establishing title superior to that of the common source and connecting himself with it; but the rule is established for the convenience of parties, relieving each from the necessity of proving title back of the common source when it is perfectly apparent that both of them are acting in recognition of that title as the true one. *Ibid.*
3. *Same—Timber—Deeds.*—When, in an action for spoil and wrong to the land, the owner of the common source of title holds a deed purporting to convey to him the fee in lands, or he is in possession thereof claiming to own them, and then conveys a restricted interest therein, in this case the right to cut and remove therefrom timber of specified size, the grantee of the restricted interest cannot deny the title of the common

EVIDENCE—*Continued.*

source, so as to make it necessary for the grantor to show his title beyond, in order to recover. *Ibid.*

4. *Same.*—Plaintiff and his grantor were in possession under deed of certain lands claiming them as absolute owners, one as reversioner and the other as life tenant. They conveyed to one of the defendants the right to cut and remove from the lands the timber of a specified size, who, in his turn, and after the death of the life tenant, entered into contract with the other defendant to cut and remove the timber for them. Thereafter, the plaintiff brought suit for damages arising from defendant's spoil and wrong to the land. *Held*, that, as according to his own deed, in evidence, the plaintiff was the owner of the lands, claiming them as his own, it was not necessary for him to prove his title further, in order to recover damages in a suit against those to whom he had conveyed the restricted estate. *Ibid.*

5. *Issues — Matters in Controversy.* — Issues tendered which are evidential and do not present the true matters in controversy are properly refused. *Clothing Co. v. Stadiem*, 6.

6. *Same—Matters in Diminution of.*—When a party to a contract thereby agreed to log the lands of the other party at a certain price, and was prevented from fulfilling his agreement by the breach thereof of the other, evidence of the subsequently increased price of labor, for the purpose of showing a diminution in the profits of logging during the period of time required to fulfill the contract, is incompetent, and a charge to the jury based upon that theory is erroneous. *Hawk v. Lumber Co.*, 10.

7. *Personal Property—Sale—Registration — Mortgage.*—A paper writing evidencing that the maker voluntarily turned over to the sheriff, to be held for the bank, certain personal property, to be delivered to the bank to partly cover checks drawn by the maker on the account of another, is a sale, and requires no registration as against a mortgage subsequently given on the property mentioned; and evidence, on the part of the bank, tending to show a valid indebtedness of the maker to it, is competent, being relevant to support the bank's title in case impeaching testimony is offered. *Leak v. Bank of Wadesboro*, 17.

8. *Witnesses—Expert Testimony as to Facts.*—Witnesses shown to be familiar with the tract of land, and lumbermen of experience having personal knowledge of the facts and conditions, may give their opinion as to the cost of cutting and delivering timber, and the profits per thousand feet, when the

EVIDENCE—*Continued.*

same is relevant to the inquiry in a suit for damages arising from a breach of contract. *Wilkinson v. Dunbar*, 20.

9. *Executors and Administrators — Final Account — Prima Facie Correct.*—In a suit involving the transactions of an administrator, his verified final account, examined, endorsed and filed by the Clerk is *prima facie* evidence of its correctness. *Rich v. Morisey*, 47.

10. *Penalty Statutes — Carriers of Goods — Demand in Writing — Parol—Burden of Proof.*—In an action for penalty, under Revisal, sec. 2634, against a carrier for failure to pay or adjust a claim within a specified time after filing it with the carrier's agent, parol evidence was competent to show that plaintiff filed his claim, and was subsequently paid the amount thereof; (1) The contents of the paper were collateral to the controversy and it was not necessary to introduce it in evidence; (2) The writing was in the carrier's possession and could be used for the purpose of contradiction; (3) The burden of proof was on the carrier to show that the claim was not filed, or was excessive. *Rabon v. R. R.*, 59.

11. *Municipal Corporation — Boundaries — Description, Sufficiency of.*—When it is found as a fact by the trial Judge, that the increased boundaries of a town, as fixed by a legislative act, include the *locus in quo*, and the section of the act setting out the boundaries is not void for uncertainty, the question as to whether the plaintiff's property was included in the boundaries prescribed does not arise on appeal in an action including such inquiry. *Lutterloh v. Fayetteville*, 65.

12. *Deeds and Conveyances—Reformation—Questions for Jury.*—In an action to correct or reform a written instrument, when there is more than a scintilla of evidence, it is for the jury, and not the Court, to say whether the evidence is clear, cogent and convincing. *Cuthbertson v. Morgan*, 72.

13. *Questions for Jury.*—During the bargain and sale of a horse, the vendor was asked by the vendee if the horse was all right. The vendor said he was sound and all right; nothing the matter except a little distemper which he, being a young horse, would soon get rid of. Vendee replied, that from "what you say and from what I see of the horse, I will give you $115 for him." The vendor accepted, saying it was an insufficient price—he had too many horses—and if the vendee found him worth more, he was to pay $10 in addition. *Held*, evidence sufficient to take the case to the jury upon the question of express warranty. *Harris v. Cannady*, 81.

14. *Mortgagor and Mortgagee — Illegal Consideration — Questions for Jury.*—When the defense to an action for the possession

EVIDENCE—*Continued.*

of personal property, claimed under mortgage by a subsequent purchaser, is that the consideration for the mortgage was the suppression of a criminal prosecution, and there is some evidence tending to show that the withdrawal of the prosecution was an independent transaction, not influenced by the promise to give the note and mortgage, it is sufficient to go to the jury. *Henderson-Snyder Co. v. Polk*, 104.

15. *Mortgagor and Mortgagee — "Chilling Sale"—Collusion—Acts and Declarations of Another—Common Purpose—Evidence—Questions for Jury.*—Under foreclosure sale made in pursuance of a power contained in a first mortgage, there was evidence tending to show that the mortgagee, acting with full knowledge and consent of his father, the defendant, procured a stranger to bid in the property at the sale, at an inadequate price, by reason of his trying to induce others not to bid, stating that it was a sham sale. The first mortgage debt was paid by defendant, who took possession of the property and sold a part of it at a much greater price, proportionately, than that paid by him under the mortgage sale. In an action for possession of the property remaining in defendant's possession, brought by the second mortgage. *Held*, (1) The evidence was sufficient to go to the jury upon the question of collusion between defendant and the mortgagee for the purpose of chilling the sale, and causing the property to bring an inadequate price; (2) The acts and declarations of the mortgagor in furtherance of the conspiracy, were competent against the defendant; (3) The evidence was sufficient to sustain a verdict for the plaintiff. *Ibid.*

16. *Account Stated — Correctness — Habitual Drunkenness.*— Evidence that the one suing on an account stated was in the habit of drinking liquor excessively, is competent for the purpose of showing that he was not qualified to transact business or to keep accounts correctly. *Davis v. Stephenson*, 113.

17. *Negligence—Burden of the Issue—Burden of Proof—Instructions.*—In an action to recover damages to plaintiff's property alleged to have been negligently caused by sparks emitted from defendant's passing engine, when there was evidence tending to show negligence. *Held*, (1) It was error in the trial Judge to charge the jury, in effect, that if they found the evidence to be true there would be a presumption in law of defendant's negligence, and the burden of proof would be upon defendant to show to the contrary; (2) Plaintiff's evidence made out a *prima facie* case to the extent only of carrying the case to the jury to find whether or not the injury was caused by defendant's negligence; (3) The burden of

EVIDENCE—*Continued.*

the issue does not shift from plaintiff, while the burden of proof may do so. (*Winslow v. Hardwood Co.*, 147 N. C., 275, cited and approved). *Cox v. R. R.*, 117.

18. *School Committee—Location of School—Discretion.*—An order restraining the action of a school committee in accepting a proposition for a change of site of a schoolhouse in a town, should be dissolved when it is shown to be in accordance with the wishes of a majority of its patrons, and to the best interests of the school. No improper motive or misconduct is evidenced by members of the committee subscribing to the purchase price of the new location, reasonably valued at $400, in exchange for which the old site, reasonably valued at $300, was to be given, as such would, in effect, be a donation of $100 for the purpose of effecting the desired change; or by the fact that a brother of a member of the committee was a part owner of the new site. *Venable v. School Committee*, 120.

19. *Railroads — "Look and Listen" — Contributory Negligence.* — Where there is evidence tending to show that a railroad company has several tracks in a city over which the plaintiff usually went in going to and from his work, and that the view of the track was obstructed, and plaintiff, standing within two paces of the track, having listened for warnings he had a right to expect, but which were not given, stepped upon the track and was injured by defendant's train running at a much greater speed than allowed by the town ordinance, and which was unsafe at the place indicated, the question of contributory negligence is properly submitted to the jury. *Inmann v. R. R.*, 123.

20. *Deeds and Conveyances—Undue Influence—Questions for Jury.* —Upon evidence tending to show that the grantor of a deed was not a provident or industrious man, that he was addicted to drink and was, at times, but not usually, incapable of attending properly to his business, and that usually he managed his own affairs, made contracts, executed deeds, etc., and that he was sober and clothed in his right mind at the time he executed the deed in question, the verdict of the jury that the deed in question was not obtained through undue influence will not be disturbed on appeal. *Myatt v. Myatt*, 137.

21. *Deeds and Conveyances — Undue Influence — Fraud.* — While undue influence sufficient to set aside a deed does not necessarily include moral turpitude, or even an improper motive, yet, when the deed is the result of a dominant influence exercised over the mind of the grantor by another, so that

EVIDENCE—*Continued.*

the mind of the grantor is suppressed or supplanted and the deed expresses the will of the actor producing the result, the deed so obtained is not improperly termed fraudulent. *Ibid.*

22. *Deeds and Conveyances — Undue Influence — Witnesses — Impeaching—Opinion of Mental Condition—Hearsay Evidence.* —In an action to set aside a deed for undue influence, a party asked his own witness to give his opinion of the mental condition of the grantor's mind during the period of several weeks just prior to the execution of the deed. He had previously stated he did not know what his condition was. The Court, in its discretion, refused to allow the witness to answer. *Held*, no error for that (a) It would, to some extent, permit the party to cross-examine his own witness; (b) The answer to the subsequent question could only have been a conclusion or inference from hearsay, or the opinion of others, taking it without the rule that such opinion, to be competent, must come from the association or personal observation of the witness himself. *Ibid.*

23. *Newly Discovered—Cumulative Evidence.*—A motion for a new trial upon newly discovered evidence must be overruled, when it appears that the evidence relied on is only cumulative. *Ibid.*

24. *Railroads—Duty of Employer—Negligence—Sufficient.*—In an action for damages for personal injury, evidence of negligence is sufficient to take the case to the jury which tends to show, that, on a dark night, without the customary signal or warning, except the rumbling noise caused by its approach, an engine, which had been coupled to the train, but had gone for water, returning and making a coupling to the train, struck the train on a level track, with violence, the force being sufficient to drive the entire train of twenty-two cars back to the distance of from a car and a half to two car lengths, just as the plaintiff, in the discharge of his duties as employee, was getting into the cab of his engine coupled at the other end of the train, thereby throwing him in front of his engine onto the track ahead, and causing the injury complained of. *Meacham v. R. R.*, 147.

25. *Same — Nonsuit — Contributory Negligence.*—Evidence tending to show that defendant railroad company negligently caused plaintiff to be thrown to the ground, and inflicted the injury complained of, while his train was on a siding at a regular station without apparent danger from approaching trains, and that he was acting under the instruction of his superiors in charge, or with their knowledge and approval, is not affected by the fact that he was not acting under a rule

EVIDENCE—*Continued.*

made for the protection of trains when on the main line, so as to raise the question of contributory negligence; and a judgment of nonsuit upon the evidence based on this contention is properly refused. *Ibid.*

26. *Nonsuit—Questions for Jury.*—In an action for damages alleged to have arisen from a wrongful death, if there is any evidence tending to show that the death was the result of defendant's negligence, it should be submitted to the jury, and a motion as of nonsuit upon the evidence disallowed. *Thompson v. R. R.*, 155.

27. *Railroads—Negligence—Death by Wrongful Act—Questions for Jury.*—In an action for damages claimed for a wrongful death owing to defendant's negligence, evidence should be submitted to the jury which tends to show, that on a dark night, about half an hour after plaintiff's intestate was seen at defendant's station, defendant's train came by at high speed, without headlights, and gave no warning or signals, at the proper places, which would indicate to plaintiff's intestate its approach; that, when last seen, plaintiff was drinking, and eating peanuts, and was found at daylight the next morning in a dying condition, with injuries indicating that he had been struck by defendant's train, and with indications on his clothes, and on the ground near him, that at or shortly before the time he was injured, he was eating peanuts. *Ibid.*

28. *Same — Dangerous Surroundings.* — In a suit for damages alleged to have arisen from the negligent killing of plaintiff's intestate by the defendant railroad company's train, running fast without a headlight, and without having given signals of approach, in its yards at a station, on a dark night, it was error in the trial Judge to exclude evidence offered for the purpose of showing that the place of its occurrence was in the corporate limits of a town, and used as a walkway with defendant's knowledge. *Ibid.*

29. *Measure of Damages — Earning Capacity.* — In an action to recover damages for personal injury caused by defendant's negligence, testimony tending to show the decreased earning capacity of plaintiff since the injury is competent, and he may be asked what wages he received before and since the time thereof. *Rushing v. R. R.*, 158.

30. *Contributory Negligence — Safe Appliances.* — When there is evidence tending to show that plaintiff was injured while in defendant's employment, by a log falling on him which he was carrying at the time, caused by defendant's negligent orders and negligent failure to furnish proper tools for the purpose, it is competent, to negative contributory negligence,

EVIDENCE—*Continued.*

to ask the plaintiff if he caused the log to fall on himself. *Ibid.*

31. *Negligence—Conflicting Evidence—Question for Jury—Nonsuit.*—A motion as of nonsuit upon the evidence should be denied, in an action to recover damages alleged to have arisen from defendant's negligence, when the testimony tends to show that the injury was caused by an improper order of a vice principal given to plaintiff in the course of his employment, and that the plaintiff was not negligent in doing the work. *Ibid.*

32. *Contributory Negligence — Safe Appliances — Assumption of Risks.*—The employer, a railroad company, owes a duty to the employee to furnish safe and suitable tools and appliances for work to be done by him, and the employee does not assume the risk of doing the work without them unless the act was obviously so dangerous that, in its careful performance, the inherent probabilities of injury were greater than those of safety. *Ibid.*

33. *Same—Proximate Cause.*—When the injury complained of was the failure of the railroad to furnish certain implements, called "lug hooks," for moving heavy timber, which plaintiff was employed to help move, it is proper for the trial Judge to instruct the jury that, if they should find, by the greater weight of the evidence, that for such service "lug hooks" were usually used by railroads for the work, it was the duty of the railroad to have furnished them; that if they further found, by the greater weight of the evidence, that the character of the work was such that a man of ordinary prudence would be led to see that their use were safer, the failure to provide them would be negligence, which, if the proximate cause, would render defendant liable. *Ibid.*

34. *Pleadings—Connected Meaning—Admissions.*—When a part of a paragraph of a pleading offered in evidence is so connected with the other part not offered that the whole is necessary to give a connected meaning, it is incompetent. *Ibid.*

35. *Measure of Damages — Past and Prospective — Permanent Injury.*—Upon an issue addressed to the quantum of damages, in an action for personal injuries, it is error to charge the jury that the inquiry could not extend to the future, but should be limited to damages sustained in the past, thus basing the charge solely upon the testimony of a physician that the injuries were not of a permanent character, when there is other evidence tending to show that the injuries were of a permanent character. *Rushing v. R. R.*, 161.

EVIDENCE—*Continued.*

36. *Same.*—As a measure of damages for personal injuries, negligently inflicted, the injured party is entitled to recover for past and prospective loss resulting from the wrongful act, including indemnity for actual expense incurred in nursing, medical attention, loss of time, loss from inability to perform mental or physical labor, incapacity to earn money, and for actual suffering of mind and body, when they are the immediate and necessary consequences of the negligent injury. *Ibid.*

37. *Exemptions — Fugitive From Justice — Animus Revertendi.* — One who is a fugitive from justice, though leaving his family here, who cannot be found in the State and whose whereabouts are unknown, and the object of whose absence is to avoid serving a criminal sentence imposed by our courts, is not a resident of the State within the meaning of Art. X, sec. 1, of our Constitution, and not entitled to his exemptions here in the absence of evidence or finding on the question of his *animus revertendi*. *Cromer v. Self*, 164.

38. *Contributory Negligence—Conclusive.*—When it appears that plaintiff's intestate was injured by attempting to go between two cars of defendant's train, chained together on a live track in constant use, and that he could easily have walked around the train by going from seventy to ninety feet and have avoided the injury, his act constitutes contributory negligence which bars recovery by his administrator. *Beck v. R. R.*, 168.

39. *Railroads—Wanton Negligence—Insufficient.*—Mere forgetfulness, whatever the consequence, does not constitute a wilful or wanton neglect of duty; for the words imply that the act was knowingly and purposely done. Therefore, when the evidence does not disclose that leaving a switch open, which caused the injury, was knowingly done, or done in utter disregard of the consequences, it is not sufficient to sustain a verdict for damages found to be occasioned by "wanton negligence" on the part of the railroad company, or its employees. *Bailey v. R. R.*, 169.

40. *Pleadings—Allegations—Proof.*—Allegations of the complaint sufficient to sustain a verdict of damages for wanton negligence are ineffectual when not sustained by the proof. *Ibid.*

41. *Pleadings—Admissions.*—It is competent for one party to put in evidence a portion of the pleadings of the other containing an allegation or admission of a distinct or separate fact relevant to the inquiry, though it is only a part of the entire paragraph, without introducing qualifying or explanatory

EVIDENCE—*Continued.*

matter inserted by way of defense, which does not modify or alter the facts alleged. *Wade v. Contracting Co.*, 177.

42. *Same—Nonsuit.*—The plaintiff, nineteen years of age, was employed chiefly to keep the books of defendant company. The vice-principal of defendant, who was directing the work, called plaintiff to assist in raising a pile driver by helping to work some jackscrews, placed for the purpose. There was evidence tending to show that the injury complained of was caused by the jackscrew being insecurely placed and certain timbers used in connection with them insecurely fastened, and in consequence of an ill-considered and negligent order, given by the vice-principal. *Held*, there was sufficient evidence of negligence to be submitted to the jury, and a motion as of nonsuit upon the evidence was properly refused. *Ibid.*

43. *Deeds and Conveyances—Declarations Explanatory of Possession—Res Gestae.*—While the issue of fraud is one to be passed upon by the jury, in an action wherein the validity of a deed is attacked on that ground, declarations that the deed was procured by fraud, when qualifying and explaining the possession and made by the party in possession of the lands claiming them as his own at the time demand therefor was made, are competent as a part of the *res gestae*, the fact of possession, though incompetent as evidence of the alleged fraudulent fact, or as an opinion of how the deed was obtained. *Smith v. Moore*, 185.

44. *Hearsay—Exceptions to Rule—Requisites.*—Parties relying upon an exception to the rule that hearsay evidence is inadmissible, must show affirmatively the existence of all facts necessary to bring the secondary evidence clearly within the exception. *Ibid.*

45. *Same.*—In order for a party to introduce in evidence stenographer's notes of the testimony of a witness taken at a former trial, it is encumbent on him to show the facts, upon which he relies, as to his being unable to procure the attendance of the witness, or have his deposition taken; and a doctor's certificate, merely to the effect that the witness is too unwell to attend the trial, without having shown previous notice to the opposing party, or without making it appear that the sickness is of a permanent character, is insufficient to bring the evidence within the exception to the general rule that hearsay evidence is inadmissible. *Ibid.*

46. *Nonsuit—How Construed.*—Upon a motion as of nonsuit upon the evidence, the evidence must be construed in its most favorable light to the plaintiff. *Cotton v. R. R.*, 227.

EVIDENCE—*Continued.*

47. *Appeal and Error—Exceptions—Rejected Evidence—Harmless Error.*—When the damages sought are those arising from a fright received by plaintiff's horse caused by a traction engine left by defendant to one side of a public highway, it is harmless error for the trial Judge to exclude evidence tending to show the gentle nature of the horse, when uncontradicted evidence to the same effect was subsequently admitted. *Davis v. Thornburg*, 233.

48. *Deeds and Conveyances — Parol Evidence — Locating Calls — Questions for Jury.*—The description in a deed conveying a town lot as follows: "Beginning at a stake on W. street, said town, 27 feet 6 inches from N. W. corner of C. T. B. lot, on the same street, and runs N. 41, W. about 25½ feet to Sycamore street; thence with Sycamore street S. 48, 117½ feet; thence S. 41, E. about 25½ feet," etc., is adequate and sufficient, and where, in connection with such deed, there is testimony to the effect "that plaintiff had built his present brick store along Sycamore street and fronting Wall street, and the wall of such store above the ground was seven inches into Sycamore street, and this infringement on Sycamore street had been satisfactorily adjusted with the town authorities," this evidence furnished data from which the second corner called for in plaintiff's deed, to-wit: the intersection between Wall and Sycamore streets, could be given a physical placing, to-wit: at a point seven inches short of the wall of the brick store, and required that the question of the correct location of plaintiff's deed should be submitted to the jury. *Hanstein v. Ferrall*, 241.

49. *Principal and Agent—Scope of Authority—Questions for Jury.*—Evidence is sufficient to go to the jury upon the authority of defendant's agent at S., a station on its road, to receive money for the purchase of a ticket from K., another station thereon, to S., to be delivered to plaintiff by the agent at K. which shows a receipt for the payment of the ticket at S., stating that it was from K. to S.; a telegram from the agent at S. to the one at K., directing that the ticket, as contended for, be furnished plaintiff; the agent at K. informed plaintiff that he could not furnish it until he had been so advised; the actual furnishing of the ticket as contended for, thereafter, on a regular form used by the defendant for such service. *Reeves v. R. R.*, 244.

50. *Deeds and Conveyances — Description — Parol Evidence.* — A deed conveying a tract of land under the description: "A certain tract or parcel of land lying and being in the county aforesaid, fronting the farm of C. W. Taylor, adjoining the

EVIDENCE—*Continued.*

farm of T. H. Robinson and others, and known as the B. H. Taylor place, being 150 acres more, or less," is sufficiently definite to permit the reception of parol testimony to fit the description to the property, and it was further competent to show by such testimony that the father of defendant, and grantee in the deed, had constituted thirty additional acres, being the *locus in quo*, as a part of the B. H. Taylor place for the purposes of the deed, and that the same was included within the descriptive terms of the instrument. *Grimes v. Bryan*, 248.

51. *Partnership—Principal and Agent—Notice to Produce Letters—Attorney and Client—Parol Evidence.*—Defendant informed a credit agency in reply to its request, by letter, that he was a member of a certain firm. The agency, by its general methods, informed its patrons, and one of them advanced credit to the firm upon the faith of the defendants being a partner. Thereafter, defendant notified the agency by letter, of which no copy was made, that his former letter was erroneous and that he was not one of the firm. The patron of the agency sued defendant to recover for goods sold and delivered. Notice to produce the second letter was given in ample time, before trial, to the attorney of plaintiff and to a local branch of the agency. *Held*, (1) Parol evidence of the contents of the letter was admissible upon failure of plaintiffs to produce letter; (2) The credit agency was the agent of the principal, and notice to the principal's attorney was sufficient; (3) The reply to notice to the local branch that all correspondence had been sent to an office of the credit agency beyond the State, was insufficient. *Rheinstein v. McDougall*, 252.

52. *Railroads—Negligence—Lights—Signals—Crossings—Nonsuit.* Plaintiff's intestate was killed by defendant's train, consisting of an engine and twenty freight cars, backing along its track on a dark night, without signals or warnings, and without lights on the rear car from the engine. At the place of the injury was an embankment on which was a track of another company running parallel with that of defendant. The injury occurred while plaintiff, an employee, was going home from his work, and crossing the tracks at a place where, to defendant's knowledge, people usually crossed. The evidence tended to show that on top and about the middle of the train were two men standing with lighted lanterns. *Held*, a judgment as of nonsuit upon the evidence should not be sustained, as the question was for the jury to determine whether the lanterns could have been readily seen at the time, and under the circumstances, by an observant person on the ground. *Allen v. R. R.*, 258.

EVIDENCE—*Continued.*

53. *Declarations—Objections and Exceptions—Appeal and Error.*—Declarations made by a party and testified to on the direct examination by a witness, not objected to at the time, and gone fully into on cross-examination, cannot be considered on appeal. *Laney v. Hutton*, 264.

54. *Nonsuit.*—When there is some evidence that defendant had acknowledged his liability for a debt sued on, a motion for judgment as of nonsuit upon the evidence should be disallowed. *Ibid.*

55. *Questions for Jury—Wills—Estates.*—When there is evidence that defendant had been in possession of lands, asserting absolute ownership for more than thirty years, under a deed conveying to him a title in fee, executed by a devisee thereof and by a trustee named in the will, and had put permanent improvements thereon; that the land had been bought and paid for by defendant, and the deed taken under advice of counsel learned in the law, that the deed conveyed the true title; that the lower Court construed the will to convey the fee, but was overruled by the Supreme Court, holding that only a life estate was devised, and that the remainderman was entitled to the possession as the owner of the fee. *Held*, the evidence is relevant to the inquiry, and the claim for betterments should be submitted to the jury. (*Merritt v. Scott*, 81 N. C., 385, cited and distinguished). *Faison v. Kelly*, 282.

56. *Contracts--Warranty.*—The mere facts that the seller of merchandise knew the purpose for which it was purchased, and, at the time, said that the grade would do, and used for the purpose intended, does not constitute a warranty. *Woodbridge v. Brown*, 299.

57. *Divorce—Specific Act.*—Testimony of a witness to an act of adultery, not embraced by the issue submitted in an action for divorce *a vinculo*, is competent, when tending to explain the previous relations of the parties. *Kinney v. Kinney*, 321.

58. *Deeds and Conveyances—Calls—Boundaries—Parol Evidence.*—When it is pertinent to the inquiry, in an action for the possession of lands, as tending to establish a call in a deed under which one of the parties to the action claims, it is competent for a witness to testify that he had heard one of the natural boundaries called by the name mentioned in the deed. *McNeely v. Laxton*, 327.

59. *Parol Evidence—Record—Harmless Error.*—Parol evidence of matters contained in a court record, when erroneously excluded, is cured by the subsequent introduction of the record itself. *Ibid.*

EVIDENCE—*Continued.*

60. *Deeds and Conveyances — Boundaries—Annexed Plat.*—When the length of a boundary line of land is not given in the conveyance, but is given in an annexed plat, the jury may consider the distance as specified in the plat in locating that line. *Ibid.*

61. *Deeds and Conveyances — Boundaries — Questions for Jury.*—In an action involving the title to lands, when the controversy is dependent upon the true location of lands described in a certain grant, the jury are not confined, necessarily, in their inquiry, to the location of the lines of other tracts called for in the grant, which are not themselves located. (*Moore v. McClain*, 141 N. C., 479, cited and approved). *Ibid.*

62. *Appeal and Error—Nonsuit—Trial—Per Curiam Not to Prejudice Rights.*—In this case, the Court held that there was sufficient evidence to go to the jury, and that a judgment as of nonsuit upon the evidence should not have been allowed. The evidence was not discussed, as such might prejudice one or the other of the parties to the litigation upon the new trial granted. *Cooper v. Rowland*, 353.

63. *Spirituous Liquors—Sale in Prohibited Territory—License.*—When there is evidence that cider sold was intoxicating, the sale of which was prohibited by law, it may be shown as an admission, or *quasi* admission, of plaintiff, that it took out United States license to sell intoxicating liquors. *Vinegar Co. v. Hawn*, 357.

64. *Deeds and Conveyances—Delivery to Third Party—Conditional Delivery—Presumption—Rebuttal.*—The execution and delivery of a deed by the maker to a third person must be accompanied by unqualified instruction to deliver, to make such delivery effectual; and when the testimony of the subscribing and only witness tends but to show that the maker signed the deed, and gave it to a third person with instruction to deliver it to the proper person if he never called for it, and that it was not delivered to the grantee in the lifetime of the maker, the presumption of delivery from the unexplained possession of the grantee and its registration is rebutted. *Fortune v. Hunt*, 358.

65. *Deeds and Conveyances—Delivered to Third Party—Presumptive Delivery—Burden of Proof—Verdict Directing—Questions for Jury.*—The presumption is that a deed duly proven was executed and delivered at the time it bears date. The burden of proof is upon the party seeking to attack its validity to show the contrary. Therefore, the Court erred in directing a verdict, but should have submitted the issue to the jury with appropriate instruction. *Ibid.*

EVIDENCE—*Continued.*

66. *Carriers of Goods—Shipper's Load and Count—Bill of Lading—Presumption—Rebuttal.*—When it is admitted that it was the consignor's duty to load a car for shipment, which had been placed at its mill for the purpose by the carrier, and that the carrier's agent gave a bill of lading upon the statement of the consignor that the car had been loaded, without being required to verify the statement, the bill of lading is not presumptive evidence of the receipt of the contents of the car, for the carrier's *prima facie* liability is rebutted by the admissions, and the question is an open one for the jury, in a suit by the consignee for the value of the contents of the car, and for the penalty for failure to deliver under Revisal, sec. 2632. *Peele v. R. R.*, 390.

67. *Same—Burden of Proof.*—When, in a suit by the consignee against a carrier for the value of a carload shipment, and penalty for failure to deliver, under Revisal, sec. 2632, it was admitted that it was the duty of the shipper to load the car; and that the carrier was not required to verify the loading, but gave the bill of lading, in evidence, upon the statement of the shipper, the burden of proving the contents of the car is upon the consignor, under the doctrine that he who has the best opportunity of knowing the facts must prove them. *Ibid.*

68. *Telegraph Companies—Time of Burial.*—Evidence of the time of burial of the person concerning whose illness a telegram has been offered to defendant to send, may be competent in an action for mental anguish arising from the wrongful refusal of defendant to receive it for transmission. *Cordell v. Telegraph Co.*, 402.

69. *Telegraph Companies—Sickness in Plaintiff's Family—Immaterial.*—In an action upon tort for the wrongful refusal of a telegraph company to receive a message for transmission, announcing an illness of a child, evidence of the number of, or the sickness in, plaintiff's family, is immaterial, and it is not reversible error. *Ibid.*

70. *Carriers of Goods—Penalty Statutes—Refusal to Accept Shipment.*—When a shipment of freight and transportation charges are refused by carrier's agent because he did not know where its given destination was, and it appears that the name given was very slightly changed from that appearing on the "Official Railway Guide and Shipping Guide" used by the carrier; the fact that another agent, who afterwards took the place of the first, promptly learned the location of the destination and the rate, and gave bill of lading and made shipment, is evidence that the rate and destination could

EVIDENCE—*Continued.*

have been ascertained by the first from the information given him, in an action for the penalty prescribed by Revisal, sec. 2631. *Reid v. R. R.*, 423.

71. *Payment—Intent.*—In this case there was evidence of an item of account between plaintiff and defendant, amounting to the sum in controversy, and defendant sent check "in full of account," not inclusive of the amount claimed by plaintiff, which plaintiff received, endorsed and kept the money on. *Held*, evidence sufficient, in this case, of the intent of full payment and discharge to go to the jury. *Armstrong v. Lonon*, 434.

72. *Deeds and Conveyances—Contracts to Convey—Treaty—Negotiations—Written Contract—Parol Evidence—Fraud or Mistake.*—When the written contract to convey lands sued on is admitted to have been signed as written, but the defense is that specific performance should not be decreed, on the ground that the defendant was induced to enter into it by the promise of the plaintiff to transfer to him a certain option on another tract of land he held, which was not done, parol evidence of all the facts and circumstances surrounding the treaty and entering into the negotiation is competent, not to correct the writing, but to enable the Court to ascertain whether there was any element of mistake or unfair advantage in the transaction taken by the party seeking equitable relief. *Rudisill v. Whitener*, 439.

73. *Indictment—Burning Barn—Evidence, Sufficient.*—Upon trial under an indictment for burning a barn in violation of Revisal, sec. 3338, there was evidence for the State tending to prove bad blood between the owner and defendant growing out of a previous difficulty, with threats of defendant against the owner and another on that account, and that the barn of the other person was burned previously to the burning of the barn in question; that the barn in question was burned about four o'clock A. M., within 375 yards of defendant's house, in plain sight, and the fire attracted the whole neighborhood except defendant, who said he did not know of it until between nine and ten o'clock, though there was evidence that defendant arose that morning between four and five o'clock; that there were well-defined running tracks from the burnt barn to defendant's house, larger than defendant's shoes, which were followed and he was found on the other side of his house, leaving it with a gun; that defendant was asked to go to the burnt barn, hesitated, refused and then complied and refused to have his shoe measured, but walked off sixty or seventy-five yards and told witness to come and

EVIDENCE—*Continued.*

measure the tracks, which was not done. *Held*, sufficient to sustain a verdict of guilty. *State v. Allen*, 458.

74. *Larceny — Evidence, Sufficient.* — Meat found in defendant's smokehouse and identified by private marks by the owner as that taken from his smokehouse, which had been broken into and meat stolen therefrom, is sufficient evidence to sustain an indictment for larceny. *State v. Dixon*, 460.

75. *Larceny — Witness in Own Behalf — Weight — Instructions.*— The material question as to the correctness of the charge of the trial Judge, bearing upon the credibility of the evidence of defendant, a witness in his own behalf on a trial under indictment, is whether the jury was misled to defendant's prejudice, and it is not error for the lower Court to charge the jury that they should consider the interest he had, scrutinize his evidence closely, but they would not be warranted in refusing to believe his evidence because of the fact he was under indictment. *Ibid.*

76. *Intoxicating Liquors, Sale of—Evidence Sufficient.*—Evidence is sufficient to sustain a verdict of guilty of keeping for sale liquor, contrary to chap. 21 of the Laws of 1908, which tends to show, that the accused borrowed the keys of a shop from the owner between 7 and 7:30 A. M., no liquor then being in the shop; that the owner went to his shop about 10 A. M., and found the accused there alone; that a search was made shortly thereafter, and a barrel of pint and half-pint bottles of whiskey was found; that, before then, and at the time in question, accused had been twice seen visiting a negro pool-room, and there was indication of some of the whiskey having been taken from the barrel. *State v. Dobbins*, 465.

77. *Same—Instructions.*—Under an indictment for keeping liquor for sale, contrary to chap. 21, Laws of 1908, it is correct to charge the jury, when there is evidence to support the charge, that, in order to convict, they must find from the evidence, beyond a reasonable doubt, that the whiskey was in defendant's possession; that he was keeping it for sale, and there was more than one quart; and that if they were not so satisfied, the defendant should be acquitted. *Ibid.*

78. *Penalty Statutes — Railroads — Sunday, Running of Freight Trains — Permission.* — Upon a trial under an indictment against a railroad company for loading, running, etc., a freight on Sunday, in violation of the provisions of Revisal, 3844, the State must show, beyond a reasonable doubt, that the defendant had permitted the offense to be done; but when the State has shown the wrongful act, it is sufficient

EVIDENCE—*Continued.*

for the jury to find that it was done with defendant's permission. *State v. R. R.*, 470.

79. *Same—Reasonable Doubt—Burden of Proof.*—Upon trial for violating the provisions of Revisal, sec. 3844, it is error for the lower Court to charge the jury that the burden was upon defendant to show that a certain freight train was run without its permission, when there is conflicting evidence upon that question; for, in order to convict, they should find as a fact, beyond a reasonable doubt, that the defendant had permitted the running of the train in violation of the statute. *Ibid.*

80. *Penalty Statutes — Railroads — Questions for Jury.*—When a *prima facie* case is made out by the State against a railroad company for running its certain freight train on Sunday, in violation of Revisal, sec. 3844, and the company has introduced evidence tending to prove that it was done without its permission, it is error in the lower Court to charge the jury, if they should find from the evidence that the train in question belonged to the defendant, they should find the defendant guilty, unless its evidence satisfies them that the train was being run without its permission, as the question is exclusively one for the jury. *Ibid.*

81. *Murder—Threats Previously Made.*—Upon trial under indictment for murder, evidence is competent of threats made by prisoner against the deceased two weeks before the homicide. *State v. Stratford*, 483.

82. *Murder — Conspiracy — Relationship — Jealousy.*—The defendants, a man and woman, were tried for murder and both convicted, there being evidence that the former procured the latter to do the act, or conspired with her to that end. *Held*, evidence that prisoner and deceased were in lewd intimacy with *feme* defendant was competent both as showing her relationship with the defendant and jealousy as a motive for the homicide. *Ibid.*

83. *Murder—One Offense—Instructions—Guilty of Certain Offense or Acquittal.*—When, under an indictment for murder, the solicitor has elected not to prosecute for the capital offense, and the evidence points either to suicide or killing with premeditation of the prisoner, it was not error in the lower Court to charge the jury that they must render a verdict of guilty of murder in the second degree, or of acquittal. *Ibid.*

84. *Circumstantial—Motive—Instructions—Harmless Error.*—It is not necessary to prove motive in order to convict upon a trial for murder, but when circumstantial evidence is relied

EVIDENCE—*Continued.*

on, it may be shown to strengthen the chain of circumstances tending to establish guilt. Where the trial Judge charged that motive was a strong circumstance pointing to guilt, but also charged that failure to show motive was a strong circumstance pointing to innocence, no error prejudicial to defendant's right was committed. *Ibid.*

85. *Railroads—Running Trains on Sunday—Indictment—Variance—Verdict Directing.*—When the proof under a bill of indictment, sufficient in form, against a railroad company for running trains, in violation of the Sunday statute, tends to fix the offense as occurring in July, and the charge assigned the date as the January following, the time is not material, and the variance is not of the substance, and a prayer of defendant that a verdict of not guilty be thereupon directed should not be granted. *State v. R. R.*, 508.

86. *Instructions—Verdict Directing — Language Used — Questions for Jury.*—When there is no conflict in the testimony, and, if believed, no inference permissible therefrom but that of guilt, it would not constitute reversible error for a trial Judge to charge the jury: "If they believe the evidence they would render a verdict of guilty"; though better form to charge, "If you find the facts to be as testified," etc.; but when there is conflict in the evidence on any essential feature of the charge, or when, though there is no such conflict, more than one inference of fact is permissible, and any of them consistent with the defendant's innocence, the question of guilt or innocence is one for the jury. *Ibid.*

87. *Murder — Defense—Insanity—Opinion—Non-Expert Witnesses—Mental Capacity.*—When the defense of insanity is pleaded by the prisoner on trial under indictment for murder, it is competent for non-expert witnesses to testify, from their own personal experience and contact with the prisoner for a period immediately preceding the act of killing, stating the facts and circumstances from which they derive their opinion, that the prisoner knew, and on the day in question knew, it was wrong to kill the deceased in the manner testified to, or established. *State v. Banner*, 520.

88. *Murder—Defense—Insanity.*—When the defense is a plea of insanity and not self-defense, a witness may not testify, as tending to show self-defense, that he had seen deceased armed, on a dark night, at a place where the prisoner would likely pass, some two weeks before the occurrence, though he may testify that he had told the prisoner concerning it, and what the prisoner said and did in consequence, only so far as it may affect the question of insanity, and for that purpose alone. *Ibid.*

EVIDENCE—*Continued.*

89. *Murder—Defense—Insanity—Character of Deceased.*—Under the plea of insanity as a defense, upon a trial under an indictment for murder, it is not competent to show the violent or dangerous character of the deceased. *Ibid.*

90. *Weight—Scintilla—Questions for Jury.*—When there is more than a scintilla of evidence as to the indentity of a defendant, it is for the jury to pass upon its weight. *State v. Walker,* 527.

91. *Secret Assault — Circumstantial Evidence — Sufficient.*— Upon trial under indictment for secret assault against two defendants, judgment was rendered against both, one of them appealed. There was evidence tending to show that assault was made upon witness and two sons, and that one of the defendants, appellant's brother, was one of them; that a pistol ball, 38 calibre, was taken thereafter from witness's arm, and that a large number of No. 12 shotgun shells, and four or five No. 38 empty pistol shells, were found in the yard where the assault was made; that appellant had that evening bought several boxes of shotgun shells, No. 12, and was seen with the other defendant, who was armed with a 38-calibre pistol, about three hours before the occurrence, within time for them to have been present; that one of the occupants of the room had previously reported a blockade still of the appellant's brother, who was admitted to have been present. *Held,* the evidence, taken collectively, was sufficient to sustain the finding of the jury. *Ibid.*

92. *Murder—Opinion Evidence—Marks of Shooting.*—Upon a trial for murder by shooting, it is competent for a witness to testify, from his own observation of facts, that there was other evidence of shooting besides the wound on the dead body, as, for instance, bullet holes, bullet marks on surrounding objects, and fresh empty shells. *State v. Peterson,* 533.

93. *Murder — Admissions, Effect of — Malice—Burden of Proof.*— Upon a trial for murder in the second degree, testimony by a State's witness of declarations of defendant subsequent to the killing that he had to kill deceased, the killing with a deadly weapon being admitted, is but an admission of the homicide alone, raising, in law, the presumption of malice, and puts the burden of showing self-defense or manslaughter upon the prisoner. *Ibid.*

94. *Murder — Admissions, Effect of — Instructions Ambiguous.*— Upon a trial for murder there was testimony that "the witness said to the prisoner: 'I saw the body. I guess you had to kill him (the deceased),' " to which the prisoner answered, "Yes." The defendant requested the Court to instruct the

EVIDENCE—*Continued.*

jury that there was insufficient testimony to go to the jury, leaving out this conversation, to connect the prisoner with the homicide; and that "if the answer of the prisoner, consisting of one word only, satisfies you beyond a reasonable doubt that the prisoner killed the deceased, and the same answer raises a reasonable doubt in your minds whether the killing was of necessity and without fault on his part, then you will acquit the prisoner." *Held*, the instruction was too ambiguous, if for no other reason, to lay the foundation of self-defense. *Ibid.*

95. *Intoxicating Liquors — Procuring Sale — Incompetent.*—If one buys whiskey for another from an illicit dealer in prohibited territory, without being interested in the sale otherwise than as agent of the purchaser, to whom he delivers it, and pays the money to the seller for the buyer, it is a wrongful procuring of the whiskey of another within the meaning of Revisal, sec. 3534; and his testimony, that he was acting solely as agent for the buyer, cannot change the character of the act from that intended by the statute. *State v. Burchfield*, 537.

96. *Manslaughter — Self-Defense — Character of Deceased.*—In a trial under an indictment for murder, evidence of the dangerous or violent character of deceased is inadmissible when there is no evidence of self-defense. *State v. Dunlap*, 550.

97. *Manslaughter—Self-Defense—Instructions.*—When there is no evidence that deceased was armed in the voluntary fight with the prisoner which resulted in his death, and evidence that the prisoner was warned not to kill deceased, but after a few minutes' fighting the prisoner shot and killed him, there is no error in the charge of the trial Judge that there was no evidence of self-defense. *Ibid.*

98. *Manslaughter—Recklessness.*—When evidence is offered tending to show the reckless indifference of the prisoner on trial for manslaughter, and not to impeach his character, and is relevant to the inquiry as characterizing the act of shooting, which resulted in death, it is competent. *State v. Lance*, 551.

99. *Instructions as to Admissions—Objections—Appeal and Error.*—An assignment of error to the charge of the trial Judge, in stating an admission of fact, will not be considered on appeal, as such matters are for him to settle; and if no such admission was made, objection should be made at the time so that he may correct the error. *Ibid.*

100. *Manslaughter — Malice — Instructions.* — When there was evidence tending to show that the prisoner recklessly fired his pistol from a moving train for the purpose of frightening the

EVIDENCE—*Continued.*

deceased, who was near the right-of-way of the railroad, and that deceased was killed thereby, there is no error in a charge, that if defendant fired the fatal shot recklessly, but without intent to kill, it would be manslaughter, which is the unlawful killing of one person by another without malice. *Ibid.*

101. *Murder — Conviction in Second Degree — Instructions — First Degree.*—When, upon trial for murder, the prisoner has been convicted of murder in the second degree, there is no reversible error in the refusal of the trial Judge to charge that there was no evidence sufficient for conviction of murder in the first degree. *State v. Fisher*, 557.

102. *Murder—Character of Deceased—Self-Defense.*—When, upon a trial for murder, the prisoner has not testified, and the only evidence of the manner of killing was given by eye-witnesses, containing no element of self-defense, testimony of the dangerous character of the deceased should be excluded, on objection. *Ibid.*

103. *Witnesses — Character — Impeaching—Contradictory.*—It may be shown, on cross-examination, by the State, to impeach defendant's character witness, that this witness had offered a reward for prisoner and therein, and otherwise, had stated and published that he was a man of dangerous character, though the trial is for murder, without element of self-defense, and with direct evidence as to the manner of the homicide. *Ibid.*

104. *Murder — Character Witness — Instructions — Weight of Evidence.*—Upon a trial for a felony, the Judge charged the jury: "You should likewise consider the evidence as to the character of the (defendant's) witnesses, whether that evidence was elicted from the witnesses themselves, on cross-examination, or otherwise, or whether it was told by witnesses who were called to testify as to the character of the other witnesses." *Held*, no error, when, immediately following he instructed the jury, in effect, that such evidence only went to the weight and credibility of the testimony in each instance. *State v. Cloninger*, 567.

105. *Same—Defendant a Witness.*—When a defendant on trial for a felony goes upon the stand in his own behalf without offering evidence as to his own character, the credibility of his testimony is in question, and the State may introduce evidence tending to show his bad character when it is confined to the purpose of contradiction, or of impeaching his evidence. *Ibid.*

EVIDENCE—*Continued.*

106. *Murder—Defendant a Witness—Character—Substantive Evidence.*—Evidence as to the character of defendant on trial for murder is substantive, when he goes upon the witness stand and introduces evidence of his good character. *Ibid.*

107. *Same—Instructions.*—Under the "transitory homicidal plea," the prisoner, on trial for murder, testified: "I guess I was unconscious . . . I saw (deceased) coming towards me . . . He said he was going to kill me, I thought he was. I then struck him." This blow was the homicidal act. The following instruction was held no error: "If the prisoner was in a state of mind at the time of the homicidal act to comprehend his relation to others, or, knowing the criminal act, was conscious that he was doing wrong, he was responsible; otherwise, he was not." *Ibid.*

108. *Murder — Manslaughter — Aider and Abettor — Evidence Sufficient.*—When one of the prisoners was present at the time deceased was killed, and, with others, followed deceased, cursing him, and got a baseball bat away from him with which another person struck the fatal blow, there is abundant evidence to sustain his conviction of manslaughter as an aider and abettor. *Ibid.*

EXAMINATION. See Witnesses, 7.

EXCEPTIONS. See Appeal and Error, 7.

EXCEPTIONS ABANDONED. See Appeal and Error, 12.

EXCEPTIONS TO WITNESS. See Witnesses, 4.

EXECUTIONS.

1. *Issuance of—Requisites.*—It is necessary for the issuance of an execution that it be actually or constructively delivered to the sheriff, and when it is made out, but not sent out of or issued from the Clerk's office, and memorandum of "execution" is entered on the docket, it is not sufficient, under Revisal, sec. 619, and does not prevent the judgment from becoming dormant. *McKeithen v. Blue*, 95.

2. *Judgments, Dormant — Defective — Procedure — Motions.* — A dormant judgment is not affected by executions made out by, but not issued from, the Clerk's office; and it is open to defendant to move before the Clerk, or before the Superior Court on appeal, that the judgment be declared dormant and that all such executions be recalled, for the reason that no executions had, in fact, been issued. *Ibid.*

3. *Judgments, Dormant—Defective—Irregularity—Sale—Innocent Purchaser, etc.*—Failure to have given to the judgment de-

EXECUTIONS—*Continued.*

fendant notice of an execution issued under a dormant judgment is only an irregularity, and does not invalidate a deed to lands, sold under the execution, made to an innocent purchaser for value, without notice of the irregularity. *Ibid.*

4. *Issuance — Time to Issue — Notice—Statutes.*—Under Revisal, 1905, secs. 619, 620, authorizing a party to proceed to enforce a judgment by execution within three years, and requiring notice to defendant before issuance of execution, where no execution has been issued within three years, the issuance of an execution after three years without notice is only an irregularity, and a sale without objection gives to a stranger, purchasing without notice, title to the property. *Ibid.*

5. *Issuance—Irregularity—Waiver.*—Where a judgment defendant appeared before the Superior Court in homestead appraisement proceedings and moved to set the same aside on the ground that he had not been notified of the time or place of appraisement, without asserting that the execution was defective, he waived the irregularity that it was issued without notice to him, as required by Revisal 1905, sec. 620. *Ibid.*

EXECUTIVE. See Pardons, 1, 2, 3, 4, 5, 6.

EXECUTORS AND ADMINISTRATORS.

1. *Mortgagor and Mortgagee—Purchaser at His Own Sale—Estoppel of Devisee and Heir—Ratification—Questions for Jury.*—A. mortgaged land to B., who, upon A.'s death, qualified as his administrator. B. sold the land pursuant to the power contained in the mortgage and procured C. to buy it. C. executed a deed to B., who charged himself, in his final account, as administrator, with the amount of the bid made by C. B. devised to D., the heir of A., a portion of the land, who, during infancy and while under coverture, entered upon the land devised to her. Thereafter she brought this action, treating the sale under the mortgage as void and offered to redeem. *Held*, (1) That the sale was voidable at the election of the heir of A. (2) That taking possession of the land devised to D. did not, as a matter of law, make an election, estopping her from the enforcement of her legal or equitable rights. (3) Whether her conduct amounted to a ratification was, in the light of the evidence, a question for the jury. His Honor's instructions upon the issue approved. *Rich v. Morisey*, 37.

2. *Mortgagor and Mortgagee — Voidable Sale — Heirs — Land Chargeable with Debts of Deceased—Accounting.*—When the heir of the mortgagor asks the Court to set aside a voidable sale and permit her to redeem, she is correctly charged, upon

EXECUTORS AND ADMINISTRATORS—*Continued.*

an accounting, with the debts of her ancestor, the mortgagee, for which the land in her hands could have been subjected. The principle upon which the accounting was had in this case is approved. The statute of limitations was not involved. *Ibid.*

3. *Evidence—Final Account—Prima Facie Correct.*—In a suit involving the transactions of an administrator, his verified final account, examined, endorsed and filed by the Clerk is *prima facie* evidence of its correctness. *Ibid.*

4. *Death by Wrongful Act—Foreign Administrators—Subsequent Qualification—Time for Bringing Suit.*—The action given by Revisal, sec. 59, to executors or administrators of the person whose death is caused by the wrongful act, etc., of another person, duly qualifying here, is not available to a foreign administrator or to an administrator who has since qualified here after the commencement of the suit and the expiration of one year from the death of his intestate, which occurred in this State. *Hall v. R. R.*, 108.

5. *Death by Wrongful Act—Procedure—When Suit Deemed to be Commenced.*—When a suit by a foreign administrator, under Revisal, sec. 59, has been dismissed, and he has subsequently qualified as administrator here, his further proceeding to recover damages for the wrongful act causing the death of his intestate, should be by a separate and independent action; but when he has been permitted by the trial Court, without objection, to become a party to the original suit and amend his pleadings to meet the changed conditions in this respect, his action will be deemed as commenced when he was made a party. (*Hall v. R. R.*, 146 N. C., 345, cited and approved). *Ibid.*

6. *Trusts and Trustees — Guardian and Ward — Commissions — Power of Courts.*—A testator in his will bequeathed certain property to his infant daughter, and should she die leaving no child or children, then to his sister. Persons named were appointed executors and trustees "to carry out and perform the trusts therein declared." By a codicil to the will a guardian for the infant daughter was appointed, and the terms of the will ratified and confirmed in all other respects. *Held*, (1) The appointment of a guardian in the codicil was not inconsistent with the appointment of the trustees by the will to hold and control the property; (2) It is not necessary that title to the property be given in express terms, and the trustees, in this instance, are to take over, as trustees, the property from themselves, as executors, and hold and invest the same according to the terms of the will and for the

EXECUTORS AND ADMINISTRATORS—*Continued.*

period of time accordingly required; (3) It being conceded that the full income is for the infant daughter, it is to be paid to her guardian during her minority, and, thereafter, to her; (4) The guardian and executors should not receive full commission on account of monies disbursed between them, and the Court should make further and appropriate orders, after due notice, in relation thereto. *Haywood v. Trust Co.*, 208.

7. *Wills—Trusts and Trustees—Deeds and Conveyances—Power to Convey Implied.*—When a power is given a trustee under a will to receive, hold and invest and reinvest, the estate of his testator, including lands, which is consistent with the other terms of the will, it confers the authority to sell the lands and make valid title thereto. *Powell v. Wood*, 235.

EXEMPTIONS.

1. *Fugitive From Justice—Evidence—Animus Revertendi.*—One who is a fugitive from justice, though leaving his family here, who cannot be found in the State and whose whereabouts are unknown, and the object of whose absence is to avoid serving a criminal sentence imposed by our courts, is not a resident of the State within the meaning of Art. X, sec. 1, of our Constitution, and not entitled to his exemptions here in the absence of evidence or finding on the question of his *animus revertendi*. *Cromer v. Self*, 164.

EXPRESSIONS OF OPINION. See Insurance, 1.

FACTS ESTABLISHED. See Verdict, 6.

FALSE REPRESENTATIONS. See Insurance, 1, 2, 3.

FEDERAL COURT. See Removal of Causes, 1, 2, 3, 4.

FELLOW SERVANT. See Master and Servant, 5, 7, 8, 9, 10.

FELONIOUSLY. See Indictment, 2.

FENCES. See Stock Law, 2; Interpretation of Statutes, 8.

FIDUCIARY RELATIONS. See Corporations, 3.

FINAL ACCOUNT. See Executors and Administrators, 3.

FINDING OF JURY. See Questions for Court, 1.

FORMAL PARTS. See Deeds and Conveyances, 49, 50.

FORMA PAUPERIS. See Suits, 1.

FORMER CONVICTION. See Malicious Prosecution, 1.

FORNICATION AND ADULTERY. See Marriage and Divorce, 3, 4.

FRAUD. See Judgments, 1; Principal and Agent, 1, 2; Corporations, 5.

FRAUD OR MISTAKE.

1. *Deeds and Conveyances—Undue Influence—Evidence.*—While undue influence sufficient to set aside a deed does not necessarily include moral turpitude, or even an improper motive, yet, when the deed is the result of a dominant influence exercised over the mind of the grantor by another, so that the mind of the grantor is suppressed or supplanted and the deed expresses the will of the actor producing the result, the deed so obtained is not properly termed fraudulent. *Myatt v. Myatt*, 137.
2. *Deeds and Conveyances—Transactions With Deceased Persons—Place of Signing—Harmless Error.*—When there is no controversy as to the fact, and it is immaterial to the issue and non-prejudicial, where the deceased was when he signed a deed, in an action attacking its validity for fraud, admission of evidence that it was signed in bed is not reversible error, upon the ground that the testimony concerned a transaction between the witness and the deceased. *Smith v. Moore*, 185.
3. *Deeds and Conveyances—Contracts to Convey—Equity—Reasonable Relief.*—When the defense to an action for specific performance to convey land is that, as a part of the consideration for the contract, entering into the treaty and forming part of the negotiations, the plaintiff was to give defendant an option on another tract of land, which was not done, the contention does not necessarily involve an allegation of fraud or intentional wrong, but in this case only the question of a reasonably well grounded belief on defendant's part that the option was to be given. *Rudisill v. Whitener*, 439.
4. *Deeds and Conveyances—Contracts to Convey—Treaty—Negotiations—Written Contract—Parol Evidence.*—When the written contract to convey lands sued on is admitted to have been signed as written, but the defense is that specific performance should not be decreed, on the ground that the defendant was induced to enter into it by the promise of the plaintiff to transfer to him a certain option on another tract of land he held, which was not done, parol evidence of all the facts and circumstances surrounding the treaty and entering into the negotiation is competent, not to correct the writing, but to enable the Court to ascertain whether there was any element of mistake or unfair advantage in the transaction taken by the party seeking equitable relief. *Ibid.*

FREIGHT TRAINS. See Penalty Statutes, 9, 10, 11; Railroads, 23, 24, 25.

FUGITIVES. See Exemptions, 1.

GIFT. See Husband and Wife, 4.

GOOD FAITH. See Vendor and Vendee, 1.

GOVERNOR. See Pardons, 1, 2, 3, 4, 5, 6.

GRAND JURY. See Constitutional Law, 14.

GUARDIAN AD LITEM. See Procedure, 5.

GUARDIAN AND WARD.

Executors and Administrators — Trusts and Trustees — Commissions—Power of Courts.—A testator in his will bequeathed certain property to his infant daughter, and should she die leaving no child or children, then to his sister. Persons named were appointed executors and trustees "to carry out and perform the trusts therein declared." By a codicil to the will a guardian for the infant daughter was appointed, and the terms of the will ratified and confirmed in all other respects. *Held*, (1) The appointment of a guardian in the codicil was not inconsistent with the appointment of the trustees by the will to hold and control the property; (2) It is not necessary that title to the property be given in express terms, and the trustees, in this instance, are to take over, as trustees, the property from themselves, as executors, and hold and invest the same according to the terms of the will and for the period of time accordingly required; (3) It being conceded that the full income is for the infant daughter, it is to be paid to her guardian during her minority, and, thereafter, to her; (4) The guardian and executors should not receive full commission on account of monies disbursed between them, and the Court should make further and appropriate orders, after due notice, in relation thereto. *Haywood v. Trust Co.*, 208.

HABEAS CORPUS.

Appeal and Error—Habeas Corpus Proceedings—Summary Effect —State's Appeal.—The State has no right of appeal from an order releasing a prisoner in *habeas corpus* proceedings, as such proceedings must necessarily be summary to be useful and give the beneficial results intended. *In re Williams*, 436.

HABENDUM. See Deeds and Conveyances, 14.

HABENDUM, LIMITATION IN. See Deeds and Conveyances, 50.

HABITUAL DRUNKENNESS. See Evidence, 16.

HARMLESS ERROR.

1. *Deeds and Conveyances—Fraud—Transactions With Deceased Persons—Place of Signing.*—When there is no controversy as to the fact, and it is immaterial to the issue and non-prejudicial where the deceased was when he signed a deed, in an action attacking its validity for fraud, admission of evidence that it was signed in bed is not reversible error, upon the ground that the testimony concerned a transaction between the witness and the deceased. *Smith v. Moore*, 185.
2. *Appeal and Error—Exceptions—Evidence Rejected.*—When the damages sought are those arising from a fright received by plaintiff's horse caused by a traction engine left by defendant to one side of a public highway, it is harmless error for the trial Judge to exclude evidence tending to show the gentle nature of the horse, when uncontradicted evidence to the same effect was subsequently admitted. *Davis v. Thornburg*, 233.
3. *Issues—Negligence—Wilful Negligence.*—An issue as to wilful negligence is not prejudicial to defendant which goes only to the quantum of damages, when there was evidence of defendant's negligence, and the amount of damages was agreed upon in the event the jury found the affirmative of the question of negligence. *Reeves v. R. R.*, 244.
4. *Parol Evidence—Record.*—Parol evidence of matters contained in a court record, when erroneously excluded, is cured by the subsequent introduction of the record itself. *McNeely v. Laxton*, 327.
5. *Questions of Law—Findings of Jury.*—Questions of law referred to the jury and properly found by them, do not constitute reversible error. *Cordell v. Telegraph Co.*, 402.
6. *Irrelevant Questions.*—When it has been established by the verdict of the jury, that, through defendant's negligence, without contributory negligence on plaintiff's part, plaintiff was thrown from the top of a car and injured, the burden being on plaintiff, his having introduced immaterial evidence relating to a defective brake wheel, upon which he was thrown, is harmless error, as the questions arising therefrom could not affect the result. *Blue v. R. R.*, 427.
7. *Issues.*—An issue submitted that does not prejudice the rights of the complaining party, though unnecessary, the whole controversy being correctly determined upon another issue, is harmless error. *Rudisill v. Whitener*, 439.
8. *Evidence, Circumstantial — Motive — Instructions.* — It is not necessary to prove motive in order to convict upon a trial

HARMLESS ERROR—*Continued.*

for murder, but when circumstantial evidence is relied on, it may be shown to strengthen the chain of circumstances tending to establish guilt; where the trial Judge charged that motive was a strong circumstance pointing to guilt, but also charged that failure to show motive was a strong circumstance pointing to innocence, no error prejudicial to defendant's right was committed. *State v. Stratford*, 483.

9. *Instructions—Remarks of Counsel.*—Remarks made to the jury by the solicitor in a trial for murder, that it had been a long time since a crime of that nature had been committed, because the juries of the county had put a stop to crime by punishing it, is not reversible error, especially when the Judge cured it by charging, that they must find their verdict from the evidence and must not be influenced by such remarks. *State v. Peterson*, 533.

HEARING. See Arbitration, 1; Injunctions, 2.

HEARSAY EVIDENCE. See Evidence, 22, 44.

HEIRS. See Election, 1; Mortgagor and Mortgagee, 3, 4.

HEIRS-AT-LAW. See Husband and Wife, 5.

HEIRS OF LIVING PERSON. See Deeds and Conveyances, 16.

HEIRS OF WIFE. See Husband and Wife, 1, 2.

HUSBAND AND WIFE.

1. *Deeds and Conveyances—Heirs of Wife—Second Wife's Dower.*—When land has been conveyed to husband and wife, omitting the word "heirs" after the names of the grantees, then to the wife by name, and heirs, the wife of a second marriage cannot claim dower after the death of the husband in the lands so conveyed, as only a life estate passed to the husband and the fee to the first wife, which, without testamentary disposition, would pass to heirs. *Sprinkle v. Spainhour*, 223.

2. *Deeds and Conveyances—Heirs of Wife—Estate Conveyed.*—A deed to a husband and wife, and only to the heirs of the latter, does not pass the fee to the former by virtue of Revisal, sec. 946, for as to him it is plainly intended that the grantor meant to convey an estate of less dignity. *Ibid.*

3. *Deeds and Conveyances — Wife's Estate — Right of Survivorship.*—When deeds are mutually given among the heirs-at-law to effect a partition of lands descended to them, and one of them is to a married woman whose husband is jointly named therein, but not jointly entitled, the doctrine of the

HUSBAND AND WIFE—*Continued.*

rights of survivorship does not apply; and it matters not if the deed was made at the wife's request, because she is presumed to have acted under his coercion. *Ibid.*

4. *Partition of Lands—Owelty Paid by Husband—No resulting Trust.*—Owelty money paid by a husband to equalize the partition of lands descended to his wife, among other heirs-at-law, as tenant in common, does not create a resulting trust in his favor to that extent, for, nothing else appearing, the law presumes he intended it for a benefit or as a gift. *Ibid.*
5. *Married Women — Tenant by the Courtesy — Heirs-at-Law — Color of Title—Statute of Limitations.*—The statute of limitations does not begin to run against a married woman, in adverse possession of lands under color for the required time, by ouster of a part thereof during her coverture, or, after her death, against her heirs-at-law during the continuous adverse possession of the husband as tenant by the courtesy. *Hill v. Lane*, 267.
6. *Estates in Entirety—Right of Survivorship—Timber—Proceeds of Sale.*—When, after marriage, a husband and wife derive title to land jointly, they are seized of the entirety—that is, *per tout, et non per my*, and neither is entitled to a division thereof by partition proceedings, or of money derived as proceeds of a voluntary sale of timber cut therefrom, as a matter of right. *Jones v. Smith & Co.*, 318.
7. *Same—Married Women—Constitutional Law.*—The provisions of the Constitution, relating to married women, makes no change in the estate in lands held by husband and wife in entirety, or the right of survivorship therein. *Ibid.*
8. *Slander—Indictment of Husband.*—Held by CLARK, C. J., and WALKER and CONNOR, JJ.: A husband is indictable, under Revisal, sec. 3640, if he wantonly and maliciously slander his wife. (*State v. Edens*, 85 N. C., 522, is overruled). *State v. Fulton*, 485.
9. *Same.*—Held by WALKER, J., that by reason of the decision in *State v. Edens, supra*, the bill against defendant herein was properly quashed, though offenders will be punishable. (Following *State v. Bell*, 136 N. C., 674). *Ibid.*
10. *Same.*—Held by BROWN and HOKE, JJ., the bill herein was properly quashed, because a husband who slanders his wife is not indictable under Revisal, sec. 3640, as heretofore held in *State v. Edens*. *Ibid.*
11. *Same.*—The judgment of the Superior Court quashing the bill is affirmed. *Ibid.*

IDENTITY. See Deeds and Conveyances, 39.

IMPLIED KNOWLEDGE. See Telegraph Companies, 5.

IMPLIED POWER. See Executors and Administrators, 7.

"IN CARE OF." See Telegraph Companies, 6.

INCEST.

Daughter of Half Sister.—Carnal intercourse of a man with the daughter of his half sister is incest, as defined by Revisal, sec. 3352. *State v. Harris*, 513.

INDICTMENT.

1. *Burning Barn—Evidence, Sufficient.*—Upon trial under an indictment for burning a barn in violation of Revisal, sec. 3338, there was evidence for the State tending to prove bad blood between the owner and defendant growing out of a previous difficulty, with threats of defendant against the owner and another on that account, and that the barn of the other person was burned previously to the burning of the barn in question; that the barn in question was burned about four o'clock A. M., within 375 yards of defendant's house, in plain sight, and the fire attracted the whole neighborhood except defendant, who said he did not know of it until between nine and ten o'clock, though there was evidence that defendant arose that morning between four and five o'clock; that there were well-defined running tracks from the burnt barn to defendant's house, larger than defendant's shoes, which were followed and he was found on the other side of his house, leaving it with a gun; that defendant was asked to go to the burnt barn, hesitated, refused and then complied and refused to have his shoe measured, but walked off sixty or seventy-five yards and told witness to come and measure the tracks, which was not done. *Held*, sufficient to sustain a verdict of guilty. *State v. Allen*, 458.

2. *Misdemeanor—"Feloniously"—"Second Offense"—Surplusage.*—When the word "feloniously" is used in a bill of indictment for an offense which the statute makes a misdemeanor, it, and a charge of "guilty of a second offense," are regarded as surplusage. *State v. Shine*, 480.

3. *Railroads—Running Trains on Sunday—Evidence—Variance—Verdict Directing.*—When the proof under a bill of indictment, sufficient in form, against a railroad company for running trains, in violation of the statute, tends to fix the offense as occurring in July, and the charge assigned the date as the January following, the time is not material, and the variance is not of the substance, and a prayer of defendant that a verdict of not guilty be thereupon directed should not be granted. *State v. R. R.*, 508.

INDICTMENT—*Continued.*

4. *Railroads—Running Trains on Sunday—Bill of Particulars—Discretion of Court, No Abuse of—Error and Appeal.*—The granting of an order for a bill of particulars to be furnished the defendant railroad company under indictment for running trains on Sunday, in violation of the statute, is in the discretion of the Court, Revisal, sec. 3244; and the question of sufficient compliance is likewise in the sound legal discretion of the trial Judge, and will not be reviewed or disturbed on appeal, unless there has been manifest abuse to defendant's prejudice. *Ibid.*

5. *Same.*—The object of a bill of particulars is to enable the defendant to properly prepare his defense in cases where the bill of indictment, though correct in form and sufficient to apprise the defendant in general terms of the accusation against him, is yet so indefinite in its statements as to the particular charge or occurrence referred to, that it does not afford defendant a fair opportunity to procure his witnesses or prepare his defense. When it appears that the trial Judge has, in his discretion, accepted a bill of particulars as being sufficient under an order theretofore granted at the instance of defendant, and that upon a former trial of the same cause the State's witnesses were examined and information so fully given as to render a further bill of particulars unnecessary, the discretion exercised by the trial Judge will not be reviewed on appeal. *Ibid.*

6. *Plea—Confession—Variance.*—Upon a plea of guilty to an indictment the guilt of the prisoner is thereby established, and the plea eliminates all questions of variance between the offense charged and the proof. *State v. Branner*, 559.

7. *Appeal and Error—Judgment, Erroneously Entered—New Trial—Solicitor's Discretion.*—Should a new trial be awarded upon appeal by the State from a judgment of not guilty, erroneously entered by the trial Judge, because the evidence did not correspond with the indictment, the question of adding another count to the bill, or sending in a new bill, is one for the solicitor alone. *Ibid.*

INJUNCTIONS.

1. *Appeal—Abstract Question.*—When pending an appeal from a judgment dissolving a restraining order the act sought to be restrained is accomplished, the Court will dismiss the appeal. *Pickler v. Board of Education*, 221.

2. *Pleadings—Hearing.*—The Judge properly continued the injunction, until the hearing, upon the allegations in the pleadings. *Martin v. Kirkpatrick*, 400.

INJUNCTIONS—*Continued.*

3. *Corporations — Dissolution — Statute — Directors — Rights of Stockholders.*—Revisal, sec. 1195, enters into every charter of a corporation subject to its provisions, and every stockholder in such corporation takes and holds his stock subject to the power of dissolution therein provided; and when the statutory provisions are complied with and the directors, acting in good faith and according to their best judgment for the interests involved, pass the resolution required, and it is concurred in by two-thirds in interest of the stockholders, it is only in rare and exceptional instances that their action should be stayed or interfered with by the courts. *White v. Kincaid*, 415.

4. *Corporations — Dissolution—Statute—Directors—Discretion.* — When a corporation lawfully proceeds to wind up its affairs in accordance with Revisal, sec. 1195, the motive prompting the act, however reprehensible or malicious, is not, as a rule, relevant to the inquiry; and the courts will not undertake to interfere with the honest exercise of discretionary powers vested by statute in the management of a corporation, however unwise or improvident it may seem in a given instance. *Ibid.*

INNOCENT PURCHASER. See Notice, 3.

IN PARI DELICTO. See Intoxicating Liquors, 1.

INSANITY.

1. *Murder—Defense—Evidence—Opinion—Non-Expert Witnesses—Mental Capacity.*—When the defense of insanity is pleaded by the prisoner on trial under indictment for murder, it is competent for non-expert witnesses to testify, from their own personal experience and contact with the prisoner for a period immediately preceding the act of killing, stating the facts and circumstances from which they derive their opinion, that the prisoner knew, and on the day in question knew, it was wrong to kill the deceased in the manner testified to, or established. *State v. Banner*, 520.

2. *Murder—Defense—Evidence.*—When the defense is a plea of insanity and not self-defense, a witness may not testify, as tending to show self-defense, that he had seen deceased armed, on a dark night, at a place where the prisoner would likely pass, some two weeks before the occurrence, though he may testify that he had told the prisoner concerning it, and what the prisoner said and did in consequence, only so far as it may affect the question of insanity, and for that purpose alone. *Ibid.*

INSANITY—*Continued.*

3. *Murder—Defense—Evidence—Character of Deceased.*—Under the plea of insanity as a defense, upon a trial under an indictment for murder, it is not competent to show the violent or dangerous character of the deceased. *Ibid.*

4. *Murder—Presumption—Burden of Proof.*—The presumption is that a prisoner on trial for murder was sane at the time of the homicidal act, with the burden on him to prove the contrary. *State v. Cloninger*, 567.

INSPECTION. See Negligence, 12.

INSTRUCTIONS.

1. *Credibility of Witnesses—Questions for Jury.*—An instruction which deprives the jury of the right to pass upon the credibility of the witnesses is properly refused. *Hawk v. Lumber Co.*, 16.

2. *Pleadings — Amendments — Slander — Conspiracy Alleged — Theory of Trial.*—When, owing to an amendment of pleadings, the trial of slander against two defendants joined in the same suit is necessarily upon the theory of conspiracy, and no other, and the issues are not so framed, it is the duty of the trial Judge to try the case upon the amended pleadings, and it is not error for him to so instruct the jury under the issues that they may not be misled by their form. *Rice v. McAdams*, 29.

3. *Arbitration—Notice.*—It appearing from the uncontradicted evidence that no notice was given of the selection of the third arbitrator, and that he heard no evidence or argument otherwise than as repeated to him by the original arbitrators, his Honor correctly instructed the jury to answer the issue setting aside the award. *Bray v. Staples*, 89.

4. *Facts Assumed—Contentions—Questions for Jury.*—A "contention," under conflicting evidence, made during the trial of an action brought upon account, that an account had been rendered and kept a reasonable time without objection, cannot be made a basis of exception to the refusal of the Judge to charge accordingly: (1) It assumes the facts as to the absence of objection and the reasonableness of the time the account was kept; (2) It does not meet the requirements of a request for instructions. *Davis v. Stephenson*, 113.

5. *Appeal and Error—Judge's Charge Assumed to be Correct.*—When it is stated in the record that the Court called the jury's attention to a matter, or had instructed upon it, the charge thereon is assumed to be correct on appeal, when it is not set out in the case. *Ibid.*

INSTRUCTIONS—*Continued.*

6. *Account Stated—Acceptance — Questions for Jury.*— Upon conflicting evidence, in a suit brought upon an account, it was not error to plaintiff's prejudice for the Judge to charge the jury there would be no legal presumption that the account was presented and accepted by defendant, and should the jury find that it had been presented and accepted, it would devolve upon the defendant to pay it. *Ibid.*

7. *Negligence—Evidence—Burden of the Issue—Burden of Proof.* —In an action to recover damages to plaintiff's property alleged to have been negligently caused by sparks emitted from defendant's passing engine, when there was evidence tending to show negligence. *Held,* (1) It was error in the trial Judge to charge the jury, in effect, that if they found the evidence to be true there would be a presumption in law of defendant's negligence, and the burden of proof would be upon defendant to show to the contrary; (2) Plaintiff's evidence made out a *prima facie* case to the extent only of carrying the case to the jury to find whether or not the injury was caused by defendant's negligence; (3) The burden of the issue does not shift from plaintiff, while the burden of proof may do so. (*Winslow v. Hardwood Co.*, 147 N. C., 275, cited and approved). *Cox v. R. R.*, 117.

8. *Deeds and Conveyances—Undue Influence.*—In an action to set aside a deed to lands alleged to have been procured by fraud or undue influence, there was evidence tending to show, that the defendant (grantee) and plaintiff (grantor) were brother and sister, and the latter executed to the former a deed reciting a valuable consideration of $10, with stipulations that he was to take care of her, look after her affairs during life and provide a suitable burial for her body at her death; that in return for this service he was to have and own all of her personal property owned at the time of her death; that she was not of sufficient mental capacity to make the deed, and that it was procured by fraud and undue influence of a nephew by marriage, who had for some time previously lived on her land. *Held,* it was error in the trial Judge to charge the jury, in effect, that for the sister, the plaintiff, to recover, she must establish, by proper proof, that the execution of the instrument in question had been procured by the fraud or undue influence of the defendant, or that the defendant was a party to it. *Beeson v. Smith*, 142.

9. *Deeds and Conveyances — Adverse Possession — Title.*— When plaintiff claims the land by adverse possession, and the defendant claims as grantee of a purchaser at a sale under a mortgage given by plaintiff, which claim plaintiff resists up-

INSTRUCTIONS—*Continued.*

on the ground that the description in the mortgage does not cover the *locus in quo*, it is not to plaintiff's prejudice for the trial Judge to charge, in effect, that, if the plaintiff was in possession of the land for twenty years and held it openly and adversely within known and visible lines and boundaries, and had never conveyed the same, it would ripen the title in him. *Grimes v. Bryan*, 249.

10. *Burden of Proof—Charge Construed as a Whole.*—There is no reversible error in the charge of the Court to the jury imposing the burden of the issue upon defendant, in an action to recover upon a note secured by a mortgage, when the charge, construed as a whole, clearly places the burden upon the plaintiff, the proper party. *Haines v. Smith*, 279.

11. *Appeal and Error—Verdict, Directing—Exceptions—Broadside Exceptions.*—A general exception to an instruction for the jury to find for the plaintiff upon the whole evidence is not too indefinite, or defective as a broadside exception. *Woodbridge v. Brown*, 299.

12. *Warranty—Quality of Merchandise.*—It is not error in the trial Judge to instruct the jury to find for the plaintiff, upon the whole evidence, in an action upon contract for goods sold and delivered, when the only defense set up was by way of counterclaim for breach of warranty, the defendant having failed to allege and prove a breach of warranty. *Ibid.*

13. *Warranty—Merchandise.*—It is not error in the trial Judge to instruct the jury to find for the plaintiff, upon the whole evidence, in an action upon contract for goods sold and delivered, when the only defense set up was by way of counterclaim for breach of warranty, the defendant having failed to allege and prove a breach of warranty. *Woodbridge v. Brown*, 299.

14. *Deeds and Conveyances—Calls—Misleading.*—Where the right of the parties depended on the correct location of a grant to J. W., and this grant for its beginning corner called for a W. O. and a gum, the beginning corner of grant to Benjamin Johnston, and there was evidence on the part of defendant tending to fix this corner of the Johnston grant at "A," it was reversible error to charge the jury that "they should locate the grant to Benjamin Johnston, if they could, and use the evidence thereon to aid them in locating the James Welborn grant." For if the corner of the Johnston grant, called for as the beginning course of the Welborn grant, was fixed and established its correct location, on the facts presented, it would fix and control the location of the beginning corner of the Welborn grant, and the jury should have been so instructed. *Mitchell v. Welborn*, 347.

INSTRUCTIONS—*Continued.*

15. *Issues — Spirituous Liquors — Interstate Commerce.* — Upon proper pleadings and evidence, it was not error for the lower Court to instruct the jury, that whether the contract of sale of spirituous liquors was made here in prohibited territory, and whether by its terms the delivery was made here, were issues of fact, in an action on contract of sale of such liquors shipped here from another State. *Vinegar Co. v. Hawn*, 355.

16. *Negligence — Contributory Negligence — Verdict, Facts Established By.*—When the question of defendant's negligence is dependent upon whether the engineer stopped the train in an unusually rough or jolting manner, and the Court charges the jury to find the appropriate issue for defendant if the engineer stopped it in the usual or ordinary manner, a verdict in plaintiff's favor establishes the defendant's negligence; and, further, when the Court charges the jury to answer likewise in defendant's favor if the plaintiff did not take all ordinary precautions to protect himself against all shocks or jolts, a verdict in plaintiff's favor clears him of contributory negligence. *Bull v. R. R.*, 427.

17. *Asked—Substantially Given.*—When the charge by the Court presents every phase of the controversy, with correct instructions as to the law, a new trial will not be awarded for failure to give the instructions asked, although they may involve correct propositions of law. *Muse v. R. R.*, 445.

18. *Charge in Writing — Supplementing, etc. — Charge Orally.* — While the trial Judge, when duly requested, must put his entire charge in writing, he may orally state the contentions of the parties or supplement slight omissions, and his doing so is not reversible error. *State v. Khoury*, 454.

19. *Charge in Writing—Sufficient Compliance.*—When, upon request of counsel, the trial Judge puts his charge in writing, and it is a full instruction generally as to the law applicable thereto, it is permissible for him to read his notes of evidence to the jury, and there is no error therein when it does not appear that the interest of the party has been prejudiced. *State v. Dixon*, 460.

20. *Reasonable Doubt—Sufficient Charge.*—In a criminal case it is not to defendant's prejudice for the trial Judge to charge the jury, in substance, upon supporting evidence, that a reasonable doubt implied that the jury must be satisfied to a moral certainty, and, if the State has so satisfied the jury, they should return a verdict of guilty, when other parts of the charge relating to the same subject matter correctly state the law. *Ibid.*

INSTRUCTIONS—*Continued.*

21. *Intoxicating Liquors, Sale of—Evidence.*—Under an indictment for keeping liquor for sale, contrary to chap. 21, Laws of 1908, it is correct to charge the jury, when there is evidence to support the charge, that, in order to convict, they must find from the evidence, beyond a reasonable doubt, that the whiskey was in defendant's possession; that he was keeping it for sale, and there was more than one quart; and that if they were not so satisfied, the defendant should be acquitted. *State v. Dobbins*, 465.

22. *Language of Charge.*—The language of a proper prayer for instruction need not be used if the charge by the Court is itself proper. *Ibid.*

23. *Murder—Evidence of One Offense—Guilty of Certain Offense or Acquittal.*—When, under an indictment for murder, the solicitor has elected not to prosecute for the capital offense, and the evidence points either to suicide of deceased or killing with premeditation of the prisoner, it was not error in the lower Court to charge the jury that they must render a verdict of guilty of murder in the second degree, or of acquittal. *State v. Stratford*, 483.

24. *Evidence, Circumstantial—Motive—Harmless Error.*—It is not necessary to prove motive in order to convict upon a trial for murder, but when circumstantial evidence is relied on, it may be shown to strengthen the chain of circumstances tending to establish guilt. Where the trial Judge charged that motive was a strong circumstance pointing to guilt, but also charged that failure to show motive was a strong circumstance pointing to innocence, no error prejudicial to defendant's right was committed. *Ibid.*

25. *Verdict Directing—Language Used—Evidence—Questions for Jury.*—When there is no conflict in the testimony, and, if believed, no inference permissible therefrom but that of guilt, it would not constitute reversible error for a trial Judge to charge the jury: "If they believe the evidence they would render a verdict of guilty"; though better form to charge, "If you find the facts to be as testified," etc.; but when there is conflict in the evidence on any essential feature of the charge, or when, though there is no such conflict, more than one inference of fact is permissible, and any of them consistent with the defendant's innocence, the question of guilt or innocence is one for the jury. *State v. R. R.*, 508.

26. *Murder—Admissions, Effect of—Ambiguous.*—Upon a trial for murder there was testimony that "the witness said to the prisoner: 'I saw the body. I guess you had to kill him (the deceased),'" to which the prisoner answered, "Yes." The

INSTRUCTIONS—*Continued.*

defendant requested the Court to instruct the jury that there was insufficient testimony to go to the jury, leaving out this conversation, to connect the prisoner with the homicide; and that "if the answer of the prisoner, consisting of one word only, satisfies you beyond a reasonable doubt that the prisoner killed the deceased, and the same answer raises a reasonable doubt in your minds whether the killing was of necessity and without fault on his part, then you will acquit the prisoner." *Held*, the instruction was too ambiguous, if for no other reason, to lay the foundation of self-defense. *State v. Peterson*, 533.

27. *Remarks of Counsel—Harmless Error.*—Remarks made to the jury by the solicitor in a trial for murder, that it had been a long time since a crime of that nature had been committed, because the juries of the county had put a stop to crime by punishing it, is not reversible error, especially when the Judge cured it by charging, that they must find their verdict from the evidence and must not be influenced by such remarks. *Ibid.*

28. *Manslaughter—Evidence—Self-Defense.*—When there is no evidence that deceased was armed in the voluntary fight with the prisoner which resulted in his death, and evidence that the prisoner was warned not to kill deceased, but after a few minutes' fighting the prisoner shot and killed him, there is no error in the charge of the trial Judge that there was no evidence of self-defense. *State v. Dunlap*, 550.

29. *Evidence — Admissions — Objections — Appeal and Error.*—An assignment of error to the charge of the trial Judge, in stating an admission of fact, will not be considered on appeal, as such matters are for him to settle; and if no such admission is made, objection should be made at the time so that he may correct the error. *State v. Lance*, 551.

30. *Instructions—How Construed—Error in Part—Cured.*—When a detached part of a charge to the jury, taken by itself, erroneously places the burden of proof upon the defendant, on trial for manslaughter, to show matters of mitigation, excuse, etc., but when construing the charge as a whole this part of the charge is correctly made to depend upon other facts, should they so find them, and the burden is then properly placed, there is no error. *Ibid.*

31. *Manslaughter—Malice.*—When there was evidence tending to show that the prisoner recklessly fired his pistol from a moving train for the purpose of frightening the deceased, who was near the right-of-way of the railroad, and that deceased was killed thereby, there is no error in a charge, that if

INSTRUCTIONS—*Continued.*

defendant fired the fatal shot recklessly, but without intent to kill, it would be manslaughter, which is the unlawful killing of one person by another without malice. *Ibid.*

32. *Murder—Conviction in Second Degree—Evidence as to First Degree.*—When, upon trial for murder, the prisoner has been convicted of murder in the second degree, there is no reversible error in the refusal of the trial Judge to charge that there was no evidence sufficient for conviction of murder in the first degree. *State v. Fisher*, 557.

33. *Appeal and Error—Stating Contentions.*—An exception that the trial Judge narrated facts not found in the evidence is untenable, when it appears that he was stating the contention of a party to the suit supported by the evidence. *Ibid.*

34. *Murder—Mental Condition—Evidence.*—Under the "transitory homicidal plea," the prisoner, on trial for murder, testified: "I guess I was unconscious . . . I saw (deceased) coming towards me . . . He said he was going to kill me, I thought he was. I then struck him." This blow was the homicidal act. The following instruction was held no error: "If the prisoner was in a state of mind at the time of the homicidal act to comprehend his relation to others, or, knowing the criminal act, was conscious that he was doing wrong, he was responsible; otherwise, he was not." (*State v. Branner, ante*, 559, cited and approved). *Ibid.*

INSURANCE.

1. *Contracts — False Representations — Expressions of Opinion— Statements of Fact — Questions for Jury.* — Declarations, though clothed in the form of an opinion or estimate, made by a duly authorized agent to induce a contract or policy of insurance, accepted and reasonably relied upon by the other party as statements of facts, may be considered upon the question of whether fraud had been thereby perpetrated; and when there is a doubt as to whether they were intended and received as mere expressions of opinion, or statement of facts to be regarded as material, the question is one for the jury. *Whitehurst v. Insurance Co.*, 273.

2. *Contracts—Principal and Agent—Agent's False Representations —Knowledge Imputed—Liability.*—When an agent of an insurance company has induced the insured to take a policy of insurance in his company by making misrepresentation of a material fact concerning which, as such agent, he should have known the truth, or makes it recklessly, or affirms its existence positively, when he is consciously ignorant whether it be true or false, his principal may be held responsible by

INSURANCE—*Continued.*

the insured relying, and having reasonable ground to rely, upon the agent's statement as importing verity. *Ibid.*

3. *Same.*—A stipulation in a policy of life insurance, among other things, gave the plaintiff, the insured, the option to "surrender this policy and withdraw the entire cash value—that is, the legal reserve, computed according to the actuary's table of mortality, and four per cent. interest, together with the dividend." There was evidence tending to show that the agent of the defendant, the insurance company, induced the plaintiff, a blind man, to take out the policy by reading this stipulation to him, and falsely informing him that the company, at the end of ten years, would pay back the premiums with interest. *Held*, (1) It was a question for the jury as to whether these assurances were intended as statements of fact, accepted and reasonably relied upon by plaintiff as a material inducement to the contract; (2) An affirmative finding of the jury thereon established an actionable fraud imputable to defendant company, entitling plaintiff to recover the premiums paid, and interest. *Ibid.*

4. *Contracts, Valid and Invalid—Severable.*—A valid contract or policy of life insurance is severable from an invalid collateral agreement made at one and the same time, respecting a benefit prohibited by statute. *Annuity Co. v. Costner*, 293.

5. *Same—When Enforcible.*—When two contracts are made at one and the same time respecting a contract or policy of life insurance, one valid and the other invalid, the valid contract is enforcible if severable from the invalid one. *Ibid.*

6. *Same—Rebates.*—A contract or policy of life insurance regularly issued and valid, is not affected by a collateral agreement that the company would deduct certain amounts by way of renewal commissions as credits on the premium; and a defense to the payment of a note given for the premiums is untenable, that the policy and note are void for reason that the special benefits or rebates were given to certain persons, and not all, of the "same class and expectation of life." Revisal, sec. 4775. Whether the collateral agreement in this case is violative of the statute, *quaere*. *Ibid.*

7. *Same — Consideration — Advantages Received.* — When the insured has given his note for the premiums on his life insurance policy, and has received for one year, in this manner, the benefits of the insurance, he cannot avoid paying his note upon the ground of his having collaterally contracted with the company for deduction of certain amounts by way of renewal commissions in violation of the provisions of Revisal, 4775. *Ibid.*

INTENT. See Evidence, 71.

INTENTION. See Wills, 2, 7.

INTENT OF GRANTOR. See Deeds and Conveyances, 49.

INTERPRETATION OF DEEDS. See Deeds and Conveyances, 14, 49, 50.

INTERPRETATION OF STATUTES.

1. *Penalty Statutes—Carriers of Goods—Failure to Pay and Adjust Claim—Proviso—Recovery Full Amount Claimed—Settlement.*—The proviso that consignee must first recover the full penalty under Revisal, sec. 2634, for the failure of the carrier to pay or adjust a claim under the requirements thereof, is only to protect the carrier against excessive demands and not to discourage settlements for losses. Hence, the plaintiff's right to recover the penalty in such suits is not lost by accepting settlement for damages for full amount claimed after the penalty had accrued. *Rabon v. R. R.*, 59.

2. *Weights and Measures—Penalty Statutes.*—Revisal, sec. 3073, requires every person using weights and measures to permit the standard-keeper to test them once in every two years, and imposes a penalty upon every person "using, buying or selling" who shall fail to comply with the requirements of the statute. *Held*, that the words "buying or selling" qualify and limit the word "using," imposing the penalty only on those "buying or selling by weights and measures." The history of the legislation in regard to weights and measures reviewed. *Vance v. R. R.*, 366.

3. *Private Rights—Doubtful Meaning.*—In interpreting a statute where the language is of doubtful meaning, the Court will reject an interpretation which would make the statute harsh, oppressive, inequitable and unduly restrictive of primary private rights. *Ibid.*

4. *Private Rights—Public Interest—Strict Construction.*—Statutes which restrict the private rights of persons or the use of property in which the public have no concern should be strictly construed. *Ibid.*

5. *Jurors—Revision of Jury List—Statutes Directory.*—Revisal, secs. 1957-1960 (Code, secs. 1722-1728), relative to the revision of the jury list, are directory only, and while they should be observed, the failure to do so does not vitiate the venire, in the absence of bad faith or corruption on the part of the county commissioners. *State v. Banner*, 519.

6. *Intoxicating Liquors—Procuring Sale—Construction of Statute—Agency—Principal.*—Revisal, sec. 3534, making it unlawful

INTERPRETATION OF STATUTES—*Continued.*

for any one to procure for and deliver spirituous liquors to another, and making such person, in law, the agent of the seller, and punishable, though its meaning is not plain, makes the one procuring liquor by purchase from an illicit dealer, in prohibited territory, and delivering it to another, the agent of the seller, and subjects him to the punishment prescribed therein, as a principal in the misdemeanor. *State v. Burchfield*, 537.

7. *Same — Evidence — Incompetent.* — If one buys whiskey for another from an illicit dealer in prohibited territory, without being interested in the sale otherwise than as agent of the purchaser, to whom he delivers it, and pays the money to the seller for the buyer, it is a wrongful procuring of the whiskey of another within the meaning of Revisal, sec. 3534; and his testimony, that he was acting solely as agent for the buyer, cannot change the character of the act from that intended by the statute. *Ibid.*

8. *Fences—Barbed Wire—Spirit and Mischief.*—A board fence with strands of barbed wire on the top, built within ten yards of a public road or highway, in a county to which Revisal, sec. 3769, applies, comes within the mischief at which the statute is directed, and the person erecting or maintaining it is guilty of a misdemeanor. *State v. Thomas*, 565.

INTERPRETATION OF WILLS. See Wills, 1, 2, 3, 4.

INTERSTATE COMMERCE.

1. *Spirituous Liquors—Sale and Contract in Prohibited Territory.*—A contract of sale of spirituous liquors, made in this State, to be delivered in prohibited territory here, is illegal, and cannot be enforced though shipped from another State. *Vinegar Co. v. Hawn*, 355.

2. *Carriers of Goods—Penalty Statutes—Refusal to Accept Shipment—Commerce Clause—Constitutional Law.*—The penalty arising under Revisal, sec. 2631, from the wrongful refusal of carrier's agent to accept an interstate shipment of freight, bears no relation to the Commerce Clause of the Federal Constitution, for the penalty accrues before the freight is accepted for transportation. *Reid v. R. R.*, 423.

INTOXICATING LIQUORS.

1. *Spirituous Liquors—Sale in Prohibited Territory—Action Upon Contract—Doctrine, In Pari Delicto.*—An action on account of sale of cider brought by the successor in business of the vendor firm, cannot be maintained, when it is established that the cider sold was intoxicating, that this was known to

INTOXICATING LIQUORS—*Continued.*

the parties and prohibited by law. Under the doctrine of *in pari delicto*, the parties are left *in statu quo*. *Vinegar Co. v. Hawn*, 355.

2. *Spirituous Liquors—Sale in Prohibited Territory—License—Evidence.*—When there is evidence that cider sold was intoxicating, the sale of which was prohibited by law, it may be shown as an admission, or *quasi* admission, of plaintiff, that it took out United States license to sell intoxicating liquors. *Ibid.*

3. *Spirituous Liquors—Sale and Contract in Prohibited Territory—Interstate Shipment.*—A contract of sale of spirituous liquors, made in this State, to be delivered in prohibited territory here, is illegal, and cannot be enforced though shipped from another State. *Ibid.*

4. *Same—Issues—Instructions.*—Upon proper pleadings and evidence, it was not error for the lower Court to instruct the jury, that whether the contract of sale of spirituous liquors was made here in prohibited territory, and whether by its terms the delivery was made here, were issues of fact, in an action on contract of sale of such liquors shipped here from another State. *Ibid.*

5. *Sale of—Evidence Sufficient.*—Evidence is sufficient to sustain a verdict of guilty of keeping for sale liquor, contrary to chap. 21 of the Laws of 1908, which tends to show, that the accused borrowed the keys of a shop from the owner between 7 and 7:30 A. M., no liquor then being in the shop; that the owner went to his shop about 10 A. M., and found the accused there alone; that a search was made shortly thereafter, and a barrel of pint and half-pint bottles of whiskey was found; that, before then, and at the time in questions, accused had been twice seen visiting a negro pool-room, and there was indication of some of the whiskey having been taken from the barrel. *State v. Dobbins*, 465.

6. *Same—Instructions.*—Under an indictment for keeping liquor for sale, contrary to chap. 21, Laws of 1908, it is correct to charge the jury, when there is evidence to support the charge, that, in order to convict, they must find from the evidence, beyond a reasonable doubt, that the whiskey was in defendant's possession; that he was keeping it for sale, and there was more than one quart; and that if they were not so satisfied, the defendant should be acquitted. *Ibid.*

7. *Unlawful Sale—Procuring for Another.*—Revisal, sec. 3534, making it criminal for one to procure whiskey for another by reason of an unlawful sale, has no application when the

INTOXICATING LIQUORS—*Continued.*

sale is not legal, or when our State legislation on the subject cannot apply to and affect the transaction by reason of the commerce clause in the Federal Constitution. *State v. Whisenant*, 515.

8. *Same—Agent of Buyer.*—When one acts entirely as agent of the buyer in ordering whiskey to be sent from another State, and has no interest in the whiskey, and has no part in the sale as vendor, or his agent or employee, he is not indictable under Revisal, sec. 3534. *Ibid.*

9. *Same — Constitutional Law — Commerce Clause.* — A sale of whiskey consummated in another State, by order of one as agent for the buyer sent from a place in the State where the sale is prohibited, is not an indictable offense under the Commerce Clause of the Federal Constitution, and State legislation cannot affect the transaction, in respect to its criminality, until and after there had been a delivery within the State. *Ibid.*

10. *Unlawful Sale—Verdict, Interpretation of—Acquittal—Entry of Different Verdict.*—Upon a trial under indictment for selling intoxicating cider and spirituous liquors, there was conflicting evidence as to the former, but the only evidence as to the latter was that defendant ordered one gallon of whiskey from K., beyond the State, for R., at the time he was ordering some for himself, without any interest in the sale as vendor, or vendor's agent or employee, but entirely as agent of the buyer. Without objection, the jury rendered a verdict to the Clerk, "Not guilty as to retailing cider or liquor, but guilty as to ordering one gallon of liquor for R." After the jury was discharged, the Court entered verdict of guilty: "Not guilty of selling liquor, other than the gallon ordered and delivered to R., as testified to by W." *Held*, (1) The sale at K. was not illegal, and not indictable; (2) It was error in the trial Judge to enter a verdict different from the one returned by the jury; (3) By reasonable intendment, the verdict of the jury was one of acquittal, excepting the order sent to K., beyond the State, and defendant should be discharged. *Ibid.*

11. *Procuring Sale—Construction of Statute—Agency—Principal.*—Revisal, sec. 3534, making it unlawful for any one to procure for and deliver spirituous liquors to another, and making such person, in law, the agent of the seller, and punishable, though its meaning is not plain, makes the one procuring liquor by purchase from an illicit dealer, in prohibited territory, and delivering it to another, the agent of the seller, and subjects him to the punishment prescribed therein, as a principal in the misdemeanor. *State v. Burchfield*, 537.

INTOXICATING LIQUORS—*Continued.*

12. *Same — Evidence — Incompetent.* — If one buys whiskey for another from an illicit dealer in prohibited territory, without being interested in the sale otherwise than as agent of the purchaser, to whom he delivers it, and pays the money to the seller for the buyer, it is a wrongful procuring of the whiskey of another within the meaning of Revisal, sec. 3534; and his testimony, that he was acting solely as agent for the buyer, cannot change the character of the act from that intended by the statute. *Ibid.*

IRREGULARITY. See Procedure, 5; Waiver, 2; Judgments, 7, 10, 11.

IRRELEVANT QUESTIONS. See Harmless Error, 6.

ISSUE, BURDEN OF. See Burden of Proof, 2.

ISSUES.

1. *Evidential—Matters in Controversy.*—Issues tendered which are evidential and do not present the true matters in controversy are properly refused. *Clothing Co. v. Stadiem*, 6.
2. *Contract—Breach by Vendee—Vendor in Possession—Vendor's Sale in Good Faith—Measure of Damages.*—On breach of contract by vendee in a sale of a stock of merchandise, the vendor, remaining in possession, may resell the goods with utmost good faith and with diligence as agent of the vendee, and recover, as damages, storage and interest on the purchase price, together with the difference between the price at which it was thus sold and that agreed upon in the contract. The question whether the resale was at a fair price is for the jury. (*Heiser v. Meares*, 120 N. C., 443, cited and distinguished). *Ibid.*
3. *Appeal and Error—Supreme Court—Discretion—New Trial.*—When error is found on appeal as to some of the issues submitted in the lower court, the Supreme Court may, in its discretion, grant a new trial as to all, when it appears that injustice would otherwise be done to one or both of the parties litigant. *Hawk v. Lumber Co.*, 10.
4. *Questions of Fact—Equity Jurisprudence—Facts Established.*—While issuable facts, as distinguished from those which are evidentiary, must ordinarily be found by a jury, when the equity jurisdiction of the Court has been invoked, the Court will not grant a new trial when it appears that all of the essential facts upon which the rights of the parties depend are established by the pleadings or have been found by the jury. *Rich v. Morisey*, 37.
5. *Limitations of Actions—Assignment of Error.*—When no issue as to the statute of limitations was tendered or requested in

ISSUES—*Continued.*

apt time, it cannot be assigned as error, after verdict, that no such issue was submitted. *Ibid.*

7. *Appeal and Error—New Trial—Discretion of Supreme Court.*—It is within the discretion of the Supreme Court to grant a new trial upon one or more issues, and let the others stand, when it clearly appears that the matters involved are entirely separate and distinct from the matters involved in the other issues, and that a new trial can be had without danger of complications with other matters; especially so when both sides appeal in an action for damages for personal injuries sustained, and error is found only in plaintiff's appeal upon the measure of damages. *Rushing v. R. R.*, 161.

8. *Negligence—Wilful Negligence—Harmless Error.*—An issue as to wilful negligence is not prejudicial to defendant which goes only to the quantum of damages, when there was evidence of defendant's negligence, and the amount of damages was agreed upon in the event the jury found the affirmative of the question of negligence. *Reeves v. R. R.*, 244.

9. *Divorce, Knowledge of Grounds of — Pleadings — Affidavit — Jurisdiction.*—It is not required by the statute, Revisal, sec. 1563, that the plaintiff allege in the complaint, in an action for divorce, his knowledge of the grounds therefor at least six months prior to its filing, and such matter is not issuable. The Court acquires jurisdiction when the proper affidavit is made. *Kinney v. Kinney*, 321.

10. *Insufficient — Verdict — Judgment.* — It is error for the trial Judge to render a judgment upon a verdict on issues submitted by him, and so framed as not to support it. *Holler v. Tel. Co.*, 336.

11. *Telegraph Companies — Parties — Notice Insufficient — Judgment—Relationship.*—In a suit against a telegraph company by the wife for damages in negligently transmitting and delivering a message announcing a death, sent to the husband, upon the face of which she does not appear as a party in interest, it is necessary to a judgment for her that an issue be submitted to, and found in her favor by, the jury, as to whether she is beneficially interested therein; and a finding that the relationship between the deceased and plaintiff was that of sister, is not sufficient, as it shows no causal connection between the injury and the negligence complained of. *Ibid.*

12. *Instructions—Spirituous Liquors—Interstate Commerce.*—Upon proper pleadings and evidence, it was not error for the lower Court to instruct the jury, that whether the contract of sale of spirituous liquors was made here in prohibited

ISSUES—*Continued.*

territory, and whether by its terms the delivery was made here, were issues of fact, in an action on contract of sale of such liquors shipped here from another State. *Vinegar Co. v. Hawn*, 355.

13. *Harmless Error.*—An issue submitted that does not prejudice the rights of the complaining party, though unnecessary, the whole controversy being correctly determined upon another issue, is harmless error. *Rudisill v. Whitener*, 439.

JEALOUSY. See Evidence, 82.

JOINDER. See Pleadings, 9.

JOINDER OF DEFENDANT. See Procedure, 2.

JUDGMENTS.

1. *Superior Court—Justice's—Plea in Bar—Fraud—Direct Proceedings.*—When, in an action in the Superior Court, the defense is set up that judgment had been entered in the court of a Justice of the Peace, and paid, and in reply the plaintiff assails the judgment on the ground that the action was instituted and the judgment procured by fraud, and with the purpose of depriving the plaintiff of his just demands, the suit in the Superior Court is a proper course to declare the entire proceedings in the Justice's court a nullity, and obtain the relief sought, all the parties in interest being before the Court. *Houser v. Bonsal*, 52.

2. *Damages—Verdict—The Word "Dollars" Omitted.*—When the jury, in response to an issue on damages, had answered the issue "five thousand," it was not error in the trial Judge to add the word "dollars" in rendering judgment, when the pleadings, the evidence, the nature of the case and contention of the parties conclusively so indicated; and an exception taken thereto after the jury has been discharged cannot be upheld. *Cox v. R. R.*, 86.

3. *Same—Unit of Currency.*—When, to an issue in a suit for a demand for damages, the jury has answered in an amount, leaving off the word "dollars," the Judge may, in the judgment rendered, supply the word, for the dollar is the unit of our currency, in which the judgment is to be paid, and all other coins are recognized as multiples or fractional parts thereof. *Ibid.*

4. *Dormant—Execution Defective—Procedure—Motions.*—A dormant judgment is not affected by executions made out by, but not issued from, the Clerk's office; and it is open to defendant to move before the Clerk, or before the Superior

JUDGMENTS—*Continued.*

Court on appeal, that the judgment be declared dormant and that all such executions be recalled, for the reason that no executions had, in fact, been issued. *McKeithen v. Blue*, 95.

5. *Dormant — Execution Defective—Irregularity—Sale—Innocent Purchaser, etc.*—Failure to have given to the judgment defendant notice of an execution issued under a dormant judgment is only an irregularity, and does not invalidate a deed to lands, sold under the execution, made to an innocent purchaser for value, without notice of the irregularity. *Ibid.*

6. *Execution—Issuance—Time to Issue—Notice—Statutes.*—Under Revisal 1905, secs. 619, 620, authorizing a party to proceed to enforce a judgment by execution within three years, and requiring notice to defendant before issuance of execution, where no execution has been issued within three years, the issuance of an execution after three years without notice is only an irregularity, and a sale without objection gives to a stranger, purchasing without notice, title to the property. *Ibid.*

7. *Justice's Court—Summons—Service—Irregularity—Voidable.*—A judgment against a non-resident defendant of the county, obtained in a Justice's court without having had the ten days' previous service of the summons, as required by Revisal, sec. 1451, is not void but irregular, or, at most, voidable. *Laney v. Hutton*, 264.

8. *Issues Insufficient—Verdict.*—It is error for the trial Judge to render a judgment upon a verdict on issues submitted by him, and so framed as not to support it. *Holler v. Telegraph Co.*, 336.

9. *Telegraph Companies — Parties—Notice—Issues Insufficient — Relationship.*—In a suit against a telegraph company by the wife for damages in negligently transmitting and delivering a message announcing a death, sent to the husband, upon the face of which she does not appear as a party in interest, it is necessary to a judgment for her that an issue be submitted to, and found in her favor by, the jury, as to whether she is beneficially interested therein; and a finding that the relationship between the deceased and plaintiff was that of sister, is not sufficient, as it shows no causal connection between the injury and the negligence complained of. *Ibid.*

10. *Proceedings to Set Aside—Irregularities—Motion in the Cause.*—Proceedings to set aside for alleged irregularities the final judgment of a Court having jurisdiction of the parties and subject matter, should be by motion in the original cause and not by an independent action. *Lanier v. Heilig*, 384.

JUDGMENTS—*Continued.*

11. *Same — Lack of Parties — Equities.* — A final judgment of a Court having jurisdiction of the parties and subject matter will not be set aside for irregularities, when it appears that all of the parties in interest are not before the Court so that the equities may be administered and full and complete justice done. *Ibid.*

12. *Wilful Abandonment of Crops—Revisal,* 3366—*Jurisdiction—Judgment Arrested.*—A Court of a Justice of the Peace has final jurisdiction of a wilful abandonment of crops in violation of Revisal, sec. 3366. A judgment of the Superior Court, to which the indictment was originally brought, will be arrested. *State v. Wilkes,* 453.

13. *Appeal and Error — Indictment — Erroneously Entered — New Trial—Solicitor's Discretion.*—Should a new trial be awarded upon appeal by the State from a judgment of not guilty, erroneously entered by the trial Judge, because the evidence did not correspond with the indictment, the question of adding another count to the bill, or sending in a new bill, is one for the solicitor alone. *State v. Branner,* 559.

JURISDICTION. See Removal of Causes, 1, 2, 3, 4.

1. *Justices of the Peace—Contract—Amount Involved.*—The test of the jurisdiction of a Justice of the Peace is the sum demanded in the summons, and when the sum so demanded in a suit upon contract does not exceed $200, he has jurisdiction, though it may appear on the Justice's docket that a greater sum could have been demanded on the facts alleged. *Teal v. Templeton,* 32.

2. *Same—Appeal—Remitter.*—When, on appeal to the Superior Court from a judgment of a court of a Justice of the Peace, the amount involved is doubtful, it may be made clear by a remitter sufficient to confer jurisdiction, even if the remitter is retroactive. *Ibid.*

3. *Concurrent—Justice of the Peace—Torts—Demand Limited.*—Under our Constitution and statute, jurisdiction is conferred upon a Justice of the Peace concurrent with that of the Superior Court of all actions of tort wherein the plaintiff, in good faith, states or limits his demand at fifty dollars, or less. *Houser v. Bonsal,* 51.

4. *Justice of the Peace — Infant Parties — Appointment of Next Friend.*—There being no statutory special method indicated by which a next friend may be appointed to represent an infant in an action properly brought in a Justice's court, Revisal, secs. 405, 1473, the rule prescribed by the Supreme Court, Revisal, sec. 1541, applies, and thereunder the appoint-

JURISDICTION—*Continued.*

ment should be made by the Justice of the Peace, using the same care and circumspection in investigating the fitness of the person to be appointed as is required by the Clerk, in actions properly brought in the Superior Court. *Ibid.*

5. *Partition of Lands — Superior Court.* — When the Superior Court acquired possession of a case of partitioning land, in term, it should have proceeded therewith according to law, and it was error to remand it to the Clerk. *Little v. Duncan*, 84.

6. *Deeds and Conveyances—Mistake of Law—Courts of Equity.*—The courts of equity have jurisdiction to correct a deed to effectuate the intention of the parties, wherein it appears from the construction of the entire instrument and from the action of the parties, that there has been a mistake of law. *Condor v. Secrest*, 201.

7. *Divorce, Knowledge of Grounds of — Pleadings — Issues — Affidavit.*—It is not required by the statute, Revisal, sec. 1563, that the plaintiff allege in the complaint, in an action for divorce, his knowledge of the grounds therefor, at least six months prior to its filing, and such matter is not issuable. The Court acquires jurisdiction when the proper affidavit is made. *Kinney v. Kinney*, 321.

8. *Wilful Abandonment of Crops—Revisal,* 3366—*Judgment Arrested.*—A court of a Justice of the Peace has final jurisdiction of a wilful abandonment of crop in violation of Revisal, sec. 3366. A judgment of the Superior Court, to which the indictment was originally brought, will be arrested. *State v. Wilkes*, 453.

9. *Legislative Power—"Recorder's Court"—Constitutional Law.*—The Legislature has the constitutional power to create a "recorder's court" of a city, giving it original jurisdiction over all criminal offenses below that of felony, and declare them to be "petty misdemeanors." *State v. Shine*, 480.

10. *Same—Appeal—Trial by Jury.*—When a legislative act creates a court of original jurisdiction for the trial of petty misdemeanors, and prescribes an appeal to the Superior Court, the constitutional right of trial by jury is preserved. *Ibid.*

11. *Appeal and Error—Criminal Offense—Erroneous Judgment—Prisoners Discharged.*—The State has no right of appeal from the action of the trial Judge in striking out a plea of guilty and entering erroneously a plea of not guilty and discharging prisoner, upon a trial for an indictable offense, as no jurisdiction thereof is given the Supreme Court by the statute. Revisal, sec. 3276. *State v. Branner*, 559.

JURISPRUDENCE. See Equity, 1.

JURORS.

1. *Motion to Quash—Challenge to Array—Plea Entered.*—A motion to quash on the ground that the jury list had not been revised, and a challenge to the array for the same reason, is made too late, in a criminal action, after entry of plea of not guilty. *State v. Banner*, 519.

2. *Revision of Jury List—Statutes Directory.*—Revisal, secs. 1957-1960 (Code, secs. 1722-1728), relative to the revision of the jury list, are directory only, and while they should be observed, the failure to do so does not vitiate the venire, in the absence of bad faith or corruption on the part of the county commissioners. *Ibid.*

3. *Qualification — Motion to Quash — Payment of Taxes — Cause Pending—Plea—Discretion of Court.*—Under the provisions of ch. 36, Laws 1907, an indictment may not be quashed or judgment arrested at any time, because one of the grand jurors had not paid his taxes or had a cause pending at issue. Formerly, it was discretionary with the trial Judge to allow or refuse such motion after entry of plea until the petit jury was sworn and empaneled, and a motion to quash after entry of plea was made too late as a matter of right. *Ibid.*

4. *Opinion Formed and Expressed — Trial Judge — Discretion.*—The finding of the trial Judge that a juror is a fair one, though he has formed and expressed an opinion, is a matter in the discretion of the trial Judge, and not reviewable on appeal. *Ibid.*

5. *Criminal Action—Right to Reject—Peremptory Challenge Not Exhausted.*—The right of the prisoner is to object to, and not to select, jurors, and when the jury has been completed before he exhausts his peremptory challenge, he cannot be heard to complain. *Ibid.*

6. *Right of Accused to Reject—Appeal and Error.*—The right of an accused, in a criminal action, is to reject and not to select the jurors, and the act of a trial Judge in standing a juror aside is not reviewable on appeal, though he should give an erroneous legal reason therefor. *State v. Peterson*, 533.

JURY LIST. See Jurors, 2.

JUS ACCRESENDI. See Husband and Wife, 6.

JUSTICES OF THE PEACE. See Jurisdiction, 8.

1. *Practice—Pleadings.*—Judgment upon a counterclaim set up in an action in a court of a Justice of the Peace cannot be had

JUSTICES OF THE PEACE—*Continued.*

on the ground that no reply was filed thereto, as the pleadings are oral in that court. *Teal v. Templeton*, 33.

2. *Same—Appeal—Discretion of Court.*—The trial on appeal in the Superior Court from a Justice's judgment is *de novo*, and the Judge may, in his discretion, allow pleadings to be filed. *Ibid.*

3. *Contracts—Timber Interests—Writing—Jurisdiction—Justice's Court.*—A contract of lease for three years or less need not be in writing. Title to land is not drawn into controversy, and a Justice's court has jurisdiction. *Ibid.*

4. *Appeal and Error—Justice's Court—Appeal Dismissed in Superior Court, Effect of—Procedure.*—The dismissal of an appeal from a court of a Justice of the Peace, when not docketed by the appellant at the term of the Superior Court prescribed by Revisal, sec. 608, has the same effect as an affirmation of a judgment thereof under sec. 607, Revisal. *McClintock v. Ins. Co.*, 35.

5. *Appeal and Error — Justice's Court — Motion to Dismiss — Laches—Discretion—Procedure.*—The action of the lower Court is not reviewable in allowing the motion of the appellee, from a judgment rendered in a court of the Justice of the Peace, to docket and dismiss an appeal when the appellant had neither paid the Clerk's fees nor requested him to docket the appeal. *Ibid.*

6. *Jurisdiction Concurrent—Torts—Demand Limited.*—Under our Constitution and statute, jurisdiction is conferred upon a Justice of the Peace concurrent with that of the Superior Court of all actions of tort wherein the plaintiff, in good faith, states or limits his demand at fifty dollars, or less. *Houser v. Bonsal*, 51.

7. *Jurisdiction—Infant Parties—Appointment of Next Friend.*—There being no statutory special method indicated by which a next friend may be appointed to represent an infant in an action properly brought in a Justice's court, Revisal, secs. 405, 1473, the rule prescribed by the Supreme Court, Revisal, sec. 1541, applies, and thereunder the appointment should be made by the Justice of the Peace, using the same care and circumspection in investigating the fitness of the person to be appointed as is required by the Clerk, in actions properly brought in the Superior Court. *Ibid.*

8. *Judgments—Infant Parties—Guardian ad Litem, Appointment of—Procedure—Irregularity—Ratification.*—A judgment rendered by a Justice of the Peace in favor of an infant plaintiff, and paid, will not be set aside by direct proceedings,

JUSTICES OF THE PEACE—*Continued.*

between the same parties for the same cause of action, solely upon the ground that the next friend of the infant in the suit was appointed by the Clerk of the court. At most, the action of the Clerk would be but an irregularity, which the Justice of the Peace may subsequently ratify by the subsequent proceedings.

9. *Superior Court—Justice's Judgments—Plea in Bar—Fraud—Direct Proceedings.*—When, in an action in the Superior Court, the defense is set up that judgment had been entered in the court of a Justice of the Peace, and paid, and in reply the plaintiff assails the judgment on the ground that the action was instituted and the judgment procured by fraud, and with the purpose of depriving the plaintiff of his just demands, the suit in the Superior Court is a proper course to declare the entire proceedings in the Justice's court a nullity, and obtain the relief sought, all the parties in interest being before the Court. *Ibid.*

10. *Justice's Court—Summons—Service on Non-Resident of County—Appearance—Waiver.*—By entering a general appearance and demurring, a non-resident defendant of the county waives or cures the defect, in proceedings against him in a Justice's court, for want of service of summons ten days preceding the trial, as prescribed by Revisal, sec. 1451. *Laney v. Hutton,* 264.

11. *Judgments—Justice's Court—Summons—Service—Irregularity—Voidable.*—A judgment against a non-resident defendant of the county, obtained in a Justice's court without having had the ten days' previous service of the summons, as required by Revisal, sec. 1451, is not void but irregular, or, at most, voidable. *Ibid.*

12. *Pleadings — Joinder of Actions — Demurrer—Misjoinder—Defense by Answer.*—When it appears, both by the summons and Justice's return, in an action brought in his court, that the plaintiff alleged a joint demand against the several defendants, a demurrer of defendants in the Superior Court for misjoinder of separate actions will not be sustained, as the allegations of the complaint must be taken as true, and such defense should be by way of answer. Revisal, sec. 477. *Ibid.*

KNOWLEDGE IMPUTED. See Insurance, 2, 3; Telegraph Companies, 5.

KNOWLEDGE OF DEFECT. See Negligence, 12.

LACHES.

Appeal and Error—Justice's Court—Motion to Dismiss—Discretion—Procedure.—The action of the lower Court is not reviewable in allowing the motion of the appellee, from a judgment rendered in a court of the Justice of the Peace, to docket and dismiss an appeal when the appellant had neither paid the Clerk's fees nor requested him to docket the appeal. *McClintock v. Ins. Co.*, 35.

LARCENY.

1. *Evidence, Sufficient.*—Meat found in defendant's smokehouse and identified by private marks by the owner as that taken from his smokehouse, which had been broken into and meat stolen therefrom, is sufficient evidence to sustain an indictment for larceny. *State v. Dixon*, 460.
2. *Witness in Own Behalf—Evidence, Weight of—Instructions.*—The material question as to the correctness of the charge of the trial Judge, bearing upon the credibility of the evidence of defendant, a witness in his own behalf on a trial under indictment, is whether the jury was misled to defendant's prejudice, and it is not error for the lower Court to charge the jury that they should consider the interest he had, scrutinize his evidence closely, but they would not be warranted in refusing to believe his evidence because of the fact he was under indictment. *Ibid.*
3. *Appeal and Error—Value of Goods—Burden of Proof—Term of Sentence.*—When there is no evidence appearing in the record of the value of goods stolen by defendant, but it appears that they consisted of eighteen hams, eleven shoulders and eight sides of meat, he cannot successfully contend that a maximum sentence of twelve months' imprisonment could not be imposed, for it is incumbent upon him to prove the value in diminution of the sentence. *Ibid.*

LEGISLATIVE POWERS.

1. *Taxation, Limitation Imposed On—Constitutional Law.*—The limitation imposed upon cities in creating a bonded indebtedness is by statute, Revisal, sec. 2977, and not a constitutional one. *Wharton v. Greensboro*, 62.
2. *Same—Ratification.*—The Legislature, having the power to impose a general limitation upon the taxing power of municipalities, may ratify a bond issue previously declared invalid by the courts on that account, and except any particular municipality from the operation of the general law. *Ibid.*
3. *Municipal Corporations—Territory Annexed—Consent of Voters—Constitutional Law.*—As there is no constitutional restric-

LEGISLATIVE POWERS—*Continued.*

tion here, our Legislature may annex contiguous or adjoining territory to that of a municipality, without the consent of the voters thereof, or of the old territory, and such action is not subject to review by the courts. *Lutterloh v. Fayetteville*, 65.

4. *Municipal Corporations — Charters — Contractual Rights — Vested Rights—Constitutional Law.*—No vested rights can accrue under a municipal charter as it is not a contract between the citizens of the municipality and the State; nor can valid objection be made to the Legislature annexing territory on the ground that the old territory owed debts, for the presumption is that value was received which inures to the benefit of those residing within the territory annexed. *Ibid.*
5. *"Recorder's Court" — Jurisdiction Defined — Constitutional Law.*—The Legislature has the constitutional power to create a "recorder's court" of a city, giving it original jurisdiction over all criminal offenses below that of felony, and declare them to be "petty misdemeanors." *State v. Shine*, 480.
6. *Same—Appeal—Trial by Jury.*—When a legislative act creates a court of original jurisdiction for the trial of petty misdemeanors, and prescribes an appeal to the Superior Court, the constitutional right of trial by jury is preserved. *Ibid.*
7. *Courts—Appeal—Grand Jury—Constitutional Law.*—No valid objection can be raised to the constitutionality of a court created by the Legislature, preserving the right of appeal to the Superior Court, because a grand jury is not the first to pass upon a bill of indictment charging the offense. *Ibid.*

LESSOR AND LESSEE.

1. *Railroads — Torts of Lessee — Liability of Lessor.* — While a lessor railroad company, having a charter from the State, remains liable for the manner in which its lessee railroad company performs the public duties arising from the use under its charter, it is not liable for the tortious acts of its lessee in carrying on an entirely separate and distinct, though similar, business of its own, and which does not fall within the duties of the lessor road to the public. *McCullock v. R. R.*, 305.
2. *Railroads — Pleadings — Cause of Action Stated—Jurisdiction —Removal of Causes—Federal Courts.*—When the complaint, in a joint suit against a domestic and foreign railroad corporation, alleges that the latter is a lessee of the former, and that its action in taking plaintiff's land for railroad purposes, the subject of the suit, was unjustifiable under the charter granted by the State to its lessor, but was for a separate and

LESSOR AND LESSEE—*Continued.*

distinct part of the lessee's business, no cause of action is alleged as to the lessor company, and the lessee, when the amount demanded is jurisdictional, can, upon proper proceedings, have the cause removed to the Federal courts. *Ibid.*

3. *Same.*—Allegations of the complaint that defendant railroad company, a domestic corporation, which had lawfully acquired the lands in question, had leased its road, and charter rights to operate it, to its co-defendant, a foreign corporation, and that, for its separate and distinct purposes, the latter had imposed an additional and unauthorized burden upon the *locus in quo*, states a cause of action against the latter company alone, and, upon proper proceedings, the cause is removable to the Federal court, when the amount is jurisdictional. *Ibid.*

LETTERS. See Notice, 6.

LIABILITY OF LESSOR. See Lessor and Lessee, 1.

LICENSE. See Evidence, 63.

LICENSE, PERMISSIVE. See Railroads, 17, 18.

LIGHTS. See Negligence, 15.

LIMITATION OF ACTIONS. See Husband and Wife, 5.

1. *Issues—Assignments of Error.*—When no issue as to the statute of limitations was tendered or requested in apt time, it cannot be assigned as error, after verdict, that no such issue was submitted. *Rich v. Morisey*, 37.

2. *Execution—Issuance—Time to Issue—Notice—Statutes.*—Under Revisal 1905, secs. 619, 620, authorizing a party to proceed to enforce a judgment by execution within three years, and requiring notice to defendant before issuance of execution, where no execution has been issued within three years, the issuance of an execution after three years without notice is only an irregularity, and a sale without objection gives to a stranger, purchasing without notice, title to the property. *McKeithen v. Blue*, 95.

3. *Executors and Administrators—Death by Wrongful Act—Foreign Administrators—Subsequent Qualification—Time for Bringing Suit.*—The action given by Revisal, sec. 59, to executors or administrators of the person whose death is caused by the wrongful act, etc., of another person, duly qualifying here, is not available to a foreign administrator or to an administrator who has since qualified here, after the commencement of the suit and the expiration of one year from the death of his intestate, which occurred in this State. *Hall v. R. R.*, 108.

LIMITATION OF ACTIONS—*Continued.*

4. *Executors and Administrators — Death by Wrongful Act — Procedure—When Suit Deemed to be Commenced.*—When a suit by a foreign administrator, under Revisal, sec. 59, has been dismissed, and he has subsequently qualified as administrator here, his further proceedings to recover damages for the wrongful act causing the death of his intestate, should be by a separate and independent action; but when he has been permitted by the trial Court, without objection, to become a party to the original suit and amend his pleadings to meet the changed conditions in this respect, his action will be deemed as commenced when he was made a party. (*Hall v. R. R.*, 146 N. C., 345, cited and approved). *Ibid.*

LOCATION OF SCHOOL. See School Committee, 1.

"LOOK AND LISTEN." See Railroads, 1, 2.

MALICE. See Evidence, 93, 100.

MALICIOUS PROSECUTION.

Former Conviction — Confession — Probable Cause.—When a defendant pleads guilty of an offense, tried in a court of a Justice of the Peace, having final jurisdiction, his own confession is conclusive evidence of probable cause, and the maker of the affidavit, upon which the warrant issued, is not liable to him in an action for damages for malicious prosecution, though the defendant was acquitted on appeal in the Superior Court. *Smith v. Thomas*, 100.

MANSLAUGHTER.

1. *Evidence — Self-Defense — Character of Deceased.*—In a trial under an indictment for murder, evidence of the dangerous or violent character of deceased is inadmissible when there is no evidence of self-defense. *State v. Dunlap*, 550.

2. *Evidence—Self-Defense—Instructions.*—When there is no evidence that deceased was armed in the voluntary fight with the prisoner which resulted in his death, and evidence that the prisoner was warned not to kill deceased, but after a few minutes' fighting the prisoner shot and killed him, there is no error in the charge of the trial Judge that there was no evidence of self-defense. *Ibid.*

3. *Evidence—Recklessness.*—When evidence is offered tending to show the reckless indifference of the prisoner on trial for manslaughter, and not to impeach his character, and is relevant to the inquiry as characterizing the act of shooting, which resulted in death, it is competent. *State v. Lance*, 551.

MANSLAUGHTER—*Continued.*

4. *Malice—Instructions.*—When there was evidence tending to show that the prisoner recklessly fired his pistol from a moving train for the purpose of frightening the deceased, who was near the right-of-way of the railroad, and that deceased was killed thereby, there is no error in a charge, that if defendant fired the fatal shot recklessly, but without intent to kill, it would be manslaughter, which is the unlawful killing of one person by another without malice. *Ibid.*
5. *Murder—Aider and Abettor—Evidence Sufficient.*—When one of the prisoners was present at the time deceased was killed, and, with others, followed deceased, cursing him, and got a baseball bat away from him with which another person struck the fatal blow, there is abundant evidence to sustain his conviction of manslaughter as an aider and abettor. *State v. Cloninger*, 567.

MARRIAGE AND DIVORCE.

1. *Divorce, Knowledge of Grounds of — Pleadings — Issues—Affidavit—Jurisdiction.*—It is not required by the statute, Revisal, sec. 1563, that the plaintiff allege in the complaint, in an action for divorce, his knowledge of the grounds therefor at least six months prior to its filing, and such matter is not issuable. The Court acquires jurisdiction when the proper affidavit is made. *Kinney v. Kinney*, 321.
2. *Pleadings—Abandonment—Defense—Proof.*—In an action for divorce *a vinculo* brought by the husband against the wife, the defense of abandonment, if relied on, should be set up in the answer, as it is not required of the plaintiff to plead and prove that he has not abandoned his wife, under Revisal, sec. 1564. *Ibid.*
3. *Pleadings—Abandonment, Allegations of.*—In an action for divorce *a vinculo* brought by the husband against the wife, an allegation in his complaint that the adultery was committed without the husband's procurement and without his knowledge or consent, and that he has not cohabited with her since he discovered her acts of adultery, does not imply his abandonment of her or put that matter at issue. *Ibid.*
4. *Pleadings—Specific Acts—Issues.*—In an action for divorce *a vinculo*, an issue as to a specific act of adultery was properly submitted, if raised by the pleadings and germane to the inquiry. *Ibid.*
5. *Evidence—Specific Act.*—Testimony of a witness to an act of adultery, not embraced by the issue submitted in an action for divorce *a vinculo*, is competent, when tending to explain the previous relations of the parties. *Ibid.*

MARRIED WOMEN. See Husband and Wife, 5, 7.

MASTER AND SERVANT.

1. *Railroads — Duty of Employer — Negligence — Evidence Sufficient.*—In an action for damages for personal injury, evidence of negligence is sufficient to take the case to the jury which tends to show, that, on a dark night, without the customary signal or warning, except the rumbling noise caused by its approach, an engine, which had been coupled to the train, but had gone for water, returning and making a coupling to the train, struck the train on a level, with violence, the force being sufficient to drive the entire train of twenty-two cars back to the distance of from a car and a half to two car lengths, just as the plaintiff, in the discharge of his duties as employee, was getting into the cab of his engine coupled at the other end of the train, thereby throwing him in front of his engine onto the track ahead, and causing the injury complained of. *Meacham v. R. R.*, 147.

2. *Railroads—Rule of Employer—Protection of Trains—Interpretation of Rules—Sidings.*—A rule of the employer, a railroad company, to the effect that a flagman is directed to go back a given distance to the rear of his train and place torpedoes in certain places, "when a train is stopped at an unusual point, or is delayed at a regular stop-over three minutes, or when it fails to make its schedule time," is for the protection of trains when they are on the main line at an unusual place, or for an unusual length of time, and for the purpose of preventing injury by reason of other trains coming from the rear, and has no application to trains on a siding at a regular station, in no apparent danger. *Ibid.*

3. *Same — Evidence — Nonsuit — Contributory Negligence.*— Evidence tending to show that defendant railroad company negligently caused plaintiff to be thrown to the ground, and inflicted the injury complained of, while his train was on a siding at a regular station without apparent danger from approaching trains, and that he was acting under the instruction of his superiors in charge, or with their knowledge and approval, is not affected by the fact that he was not acting under a rule made for the protection of trains when on the main line, so as to raise the question of contributory negligence; and a judgment of nonsuit upon the evidence based on this contention is properly refused. *Ibid.*

4. *Rules of Employer — Interpretation — Parol Evidence — Rule Inapplicable.*—Parol evidence tending to show that conditions had arisen in a particular instance so that a printed rule of employer did not apply, is not an interpretation of the rule by parol. *Ibid.*

MASTER AND SERVANT—*Continued.*

5. *Negligence—Fellow Servants.*—A negligent and careless act of a fellow servant in throwing down the end of a log which the plaintiff, in the scope of his employment, was helping to carry, will render the employer (a railroad company) liable in damages, if the proximate cause of an injury to the plaintiff. *Rushing v. R. R.*, 158.

6. *Railroads—Duty to Employees—Trespassers.*—A railroad company does not owe the same duty to one who has surreptitiously climbed, in the night, upon the tender of its switching engine, being used around its extensive and dangerous railroad yards at its station, as it does to its employees; and no invitation to do such an act can be implied from such conditions and surroundings. *Bailey v. R. R.*, 169.

7. *Defenses—Fellow Servant Act—Railroads.*—The defense that the injury complained of resulted from the negligent act of a fellow servant is still available, except in its application to a railroad company; for, by express terms, the statute known as the "Fellow Servant Act," by which this defense was withdrawn, is confined in its operation to railroad companies. *Wade v. Contracting Co.*, 177.

8. *Negligence — Fellow Servant — Vice Principal — Respondeat Superior.*—When an order negligently given by a vice principal, present at the time and directing the work, obediently carried out by one fellow servant, immediately caused the injury to the other one, the negligence is imputed to the principal, and a prayer for instruction is properly refused, to the effect, that if the plaintiff was injured, under such circumstances, by the misconduct of a co-employee, he could not recover. *Ibid.*

9. *Negligence of Fellow Servant—Recovery.*—In an action by an employee to recover damages for personal injury alleged to have arisen from a negligent act, if the negligence of the employer and a fellow employee concurs in producing the injury, the injured employee can recover of either, if he himself is free from blame. *Ibid.*

10. *Same—Evidence—Nonsuit.*—The plaintiff, nineteen years of age, was employed chiefly to keep the books of defendant company. The vice principal of defendant, who was directing the work, called plaintiff to assist in raising a pile driver by helping to work some jackscrews, placed for the purpose. There was evidence tending to show that the injury complained of was caused by the jackscrew being insecurely placed and certain timbers used in connection with them insecurely fastened, and in consequence of an ill-considered and negligent order, given by the vice principal. *Held,* there

MASTER AND SERVANT—*Continued.*

was sufficient evidence of negligence to be submitted to the jury, and a motion as of nonsuit upon the evidence was properly refused. *Ibid.*

11. *Safe Appliances — Negligence — Damages.* — In an action for damages for injuries received, alleged to have been the result of improper instruments given by the employer to the employee with which the latter was to do the work entrusted to him, the liability of the former, in damages, depends upon whether he was negligent in respect to the instrumentalities provided. *Cotton v. R. R.*, 228.

12. *Same—Proof Required.*—For the recovery of damages for injury alleged to have been caused to an employee by reason of the negligently furnishing by the employer improper implement with which he was to perform his work within the scope of his employment, the former, to establish his case, must show: (1) That the implement furnished by the master was, at the time of the injury, defective; (2) That the master knew of the defect, or was negligent in not discovering it and making needed repairs; (3) That the defect was the proximate cause of the injury. (In this case, the question as to the duty of the servant to inform the master of the defect did not arise upon the evidence). *Ibid.*

13. *Safe Appliances — Knowledge of Defect — Inspection — Negligence.*—The employer must not only use ordinary care and diligence to provide safe and suitable implements for the employee to do the work required of him, but he must exercise a reasonable supervision over them and ordinary care in keeping them in safe condition. When an employee is injured by a defective truck on which he was required to carry trunks to a train at defendant's station, and there is evidence that a pin keeping a wheel on had been worn by constant use so that it gave way, resulting in the injury complained of, the question is for the jury to say whether, by a careful inspection, the defendant should have discovered the defective condition. *Ibid.*

14. *Employer and Employee—Negligence of Employee—Construction of Scaffold—Vice Principal.*—When an employee has been instructed by the employer to do certain work upon a scaffold, and he was injured, owing to a negligent and faulty construction of the scaffold by another employee entrusted to build it, it is not necessary that the employee entrusted to build the scaffold be a vice principal, in order to hold the employer liable for an injury which is the proximate cause of the negligent act. *Barkley v. Waste Co.*, 287.

MEASURE OF DAMAGES. See Damages.

1. *Contract—Breach by Vendee—Vendor in Possession—Vendor's Sale in Good Faith.*—On breach of contract by vendee in a sale of a stock of merchandise, the vendor, remaining in possession, may resell the goods with utmost good faith and with diligence as agent of the vendee, and recover, as damages, storage and interest on the purchase price, together with the difference between the price at which it was thus sold and that agreed upon in the contract. The question whether the resale was at a fair price is for the jury. (*Heiser v. Meares*, 120 N. C., 44, cited and distinguished). *Clothing Co. v. Stadiem*, 6.
2. *Contracts, Breach of—From What Time Estimated.*—Parties to a contract are presumed to have contracted with reference to the damages which would arise from a breach thereof under the conditions existing at the time of the breach. *Hawk v. Lumber Co.*, 10.
3. *Same—Evidence—Matters in Diminution of.*—When a party to a contract thereby agreed to log the lands of the other party at a certain price, and was prevented from fulfilling his agreement by the breach thereof of the other, evidence of the subsequently increased price of labor, for the purpose of showing a diminution in the profits of logging during the period of time required to fulfill the contract, is incompetent, and a charge to the jury based upon that theory is erroneous. *Ibid.*
4. *Evidence—Earning Capacity.*—In an action to recover damages for personal injury caused by defendant's negligence, testimony tending to show the decreased earning capacity of plaintiff since the injury, is competent, and he may ask what wages he received before and since the time thereof. *Rushing v. R. R.*, 158.
5. *Past and Prospective—Permanent Injury—Evidence.*—Upon an issue addressed to the quantum of damages, in an action for personal injuries, it is error to charge the jury that the inquiry would not extend to the future, but should be limited to damages sustained in the past, thus basing the charge solely upon the testimony of a physician that the injuries were not of a permanent character, when there is other evidence tending to show that the injuries were of a permanent character. *Rushing v. R. R.*, 161.
6. *Same.*—As a measure of damages for personal injuries, negligently inflicted, the injured party is entitled to recover for past and prospective loss resulting from the wrongful act, including indemnity for actual expense incurred in nursing, medical attention, loss of time, loss from inability to per-

MEASURE OF DAMAGES—*Continued.*

form mental or physical labor, incapacity to earn money, and for actual suffering of mind and body, when they are the immediate and necessary consequences of the negligent injury. *Ibid.*

7. *Telegraph Companies—Message Tendered and Refused—Torts.*—In an action arising in tort against a telegraph company for the wrongful refusal to receive a message for transmission and delivery, the damages recoverable are all such as proximately flow therefrom, and are not limited to those within the contemplation of the parties. *Cordell v. Telegraph Co.*, 402.

8. *Contracts, Breach of—Prospective Profits, How Estimated.*—When an injured party to a contract is entitled to recover prospective damages, proper allowance should be made for the fact that recovery is had for damages that would have accrued at a future time, and the Courts and juries should see that such is made for those fluctuations, which are likely to occur. Where, however, the recovery is for the cutting and delivery at a certain price of several millions of feet of timber, a contract requiring years in its performance beyond the time when the breach was established, it was error in the trial Judge to instruct the jury, generally, that the measure of damages was the difference between the amount to be paid for the work and the cost of performance. This is correct as to damages already accrued, but, as to those to arise in the future, the rule should be the present value of such damages. *Wilkinson v. Dunbar*, 20.

9. *Contracts — Prospective Profits — Contemplation of Parties.*—Prospective profits are advantages which are the direct and immediate fruits of the contract entered into between the parties, are a part and parcel of the contract, and presumed to have been taken into consideration at the time it was made. *Ibid.*

MENTAL CAPACITY. See Evidence, 87.

MENTAL CONDITION. See Deeds and Conveyances, 9.

MESSAGE TENDERED. See Telegraph Companies, 2, 4, 5.

MISDEMEANOR. See Indictment, 2.

MISJOINDER. See Pleadings, 9.

MISJOINDER OF DEFENDANT. See Procedure, 2.

MISSTATEMENTS OF LAW. See Power of Court, 10; Deeds and Conveyances, 18.

MONEY DEMAND. See Removal of Causes, 4.

MORTGAGE. See Mortgagor and Mortgagee, 7.

MORTGAGOR AND MORTGAGEE.

1. *Personal Property—Evidence of Sale—Registration.*—A paper writing evidencing that the maker voluntarily turned over to the sheriff, to be held for the bank, certain personal property, to be delivered to the bank to partly cover checks drawn by the maker on the account of another, is a sale, and requires no registration as against a mortgage subsequently given on the property mentioned; and evidence, on the part of the bank, tending to show a valid indebtedness of the maker to it, is competent, being relevant to support the bank's title in case impeaching testimony is offered. *Lee v. Bank of Wadesboro*, 17.

2. *Executors and Administrators—Purchaser at His Own Sale—Estoppel of Devisee and Heir—Ratification—Questions for Jury.*—A. mortgaged land to B., who, upon A.'s death, qualified as his administrator. B. sold the land pursuant to the power contained in the mortgage and procured C. to buy it. C. executed a deed to B., who charged himself, in his final account, as administrator, with the amount of the bid made by C. B. devised to D., the heir of A., a portion of the land, who, during infancy and while under coverture, entered upon the land devised to her. Thereafter she brought this action, treating the sale under the mortgage as void and offered to redeem. *Held*, (1) That the sale was voidable at the election of the heir of A. (2) That taking possession of the land devised to D. did not, as a matter of law, make an election, estopping her from the enforcement of her legal or equitable rights. (3) Whether her conduct amounted to a ratification was, in the light of the evidence, a question for the jury. His Honor's instructions upon the issue approved. *Rich v. Morisey*, 37.

3. *Voidable Sale—Executors and Administrators — Heirs — Land Chargeable with Debts of Deceased—Accounting.*—When the heir of the mortgagor asks the Court to set aside a voidable sale and permit her to redeem, she is correctly charged, upon an accounting, with the debts of her ancestor, the mortgagee, for which the land, in her hands could have been subjected. The principle upon which the accounting was had in this case is approved. The statute of limitations was not involved. *Rich v. Morisey*, 47.

4. *Sale Under Mortgage Set Aside—Heir—Purchase Price.*—In setting aside a deed to the mortgagee of lands indirectly purchased by him at his own sale, under a power in the mort-

MORTGAGOR AND MORTGAGEE—*Continued.*

gage, the Court will require the heir claiming under the mortgagor to account for the purchase price, which has been applied to the payment of her ancestor's debts. *Ibid.*

5. *Illegal Consideration—Evidence—Questions for Jury.*—When the defense to an action for the possession of personal property, claimed under mortgage by a subsequent purchaser, is that the consideration for the mortgage was the suppression of a criminal prosecution, and there is some evidence tending to show that the withdrawal of the prosecution was an independent transaction, not influenced by the promise to give the note and mortgage, it is sufficient to go to the jury. *Henderson-Snyder Co. v. Polk*, 104.

6. *"Chilling Sale"—Collusion—Evidence—Acts and Declarations of Another — Common Purpose — Evidence — Questions for Jury.*—Under foreclosure sale made in pursuance of a power contained in a first mortgage, there was evidence tending to show that the mortgagee, acting with full knowledge and consent of his father, the defendant, procured a stranger to bid in the property at the sale, at an inadequate price, by reason of his trying to induce others not to bid, stating that it was a sham sale. The first mortgage debt was paid by defendant, who took possession of the property and sold a part of it at a much greater price, proportionately, than that paid by him under the mortgage sale. In an action for possession of the property remaining in defendant's possession, brought by the second mortgagee. *Held*, (1) The evidence was sufficient to go to the jury upon the question of collusion between defendant and the mortgagee for the purpose of chilling the sale, and causing the property to bring an inadequate price; (2) The acts and declarations of the mortgagor in furtherance of the conspiracy, were competent against the defendant; (3) The evidence was sufficient to sustain a verdict for the plaintiff. *Ibid.*

7. *Bankrupt Act — Mortgage — Time of Execution of Power of Sale.*—The provision of the Bankrupt Act making all debts owing by the bankrupt due and payable at the date of the adjudication, does not affect the terms of a mortgage executed by him, in which the date at which the power of sale may be executed is fixed. *Martin v. Kirkpatrick*, 400.

MOTION IN THE CAUSE. See Judgments, 10.

MOTIONS. See Nonsuit, 1; Procedure, 8.

MOTION TO DISMISS. See Appeal and Error, 6.

MOTION TO QUASH. See Jurors, 1, 3.

MOTIVE. See Evidence, 84.

MUNICIPAL CORPORATIONS. See Corporations.

1. *New Territory—Exercise of Jurisdiction—Remedy by Injunction.*—When the relief sought is to restrain a town from exercising jurisdiction within a territory recently included within the municipality, the proper remedy is an action for perpetual injunction, and when there are no issues of fact raised, and the injunction is refused, the Judge must necessarily determine the case upon its merits. *Lutterloh v. Fayetteville,* 165.

2. *Boundaries—Description, Sufficiency of—Evidence.*—When it is found as a fact by the trial Judge, that the increased boundaries of a town, as fixed by a legislative act, include the *locus in quo,* and the section of the act setting out the boundaries is not void for uncertainty, the question as to whether the plaintiff's property was included in the boundaries prescribed does not arise on appeal in an action including such inquiry. *Ibid.*

3. *Territory Annexed—Aye and No Vote—Constitutional Law.*—When a municipal charter has been passed in accordance with Art. II, sec. 14, of the Constitution, requiring the aye and no vote to be taken on the several days, it is not necessary for an act annexing territory thereto to be passed in like manner to confer authority for the levying of taxes within the territory annexed. *Ibid.*

4. *Constitutional Law—Taxation—Representation.*—An objection to the validity of an act adding territory to that of a town, for that it restricted the right to vote on the subject of municipal taxation to the voters within the annexed territory, is without merit, when it appears from a construction of the act as a whole that a contrary intention is declared. *Ibid.*

5. *Territory Annexed—Consent of Voters—Legislative Powers—Constitutional Law.*—As there is no constitutional restriction here, our Legislature may annex contiguous or adjoining territory to that of a municipality, without the consent of the voters thereof, or of the old territory, and such action is not subject to review by the Courts. *Ibid.*

6. *Charters — Contractual Rights — Vested Rights — Legislative Powers—Constitutional Law.*—No vested rights can accrue under a municipal charter as it is not a contract between the citizens of the municipality and the State; nor can valid objection be made to the Legislature annexing territory thereto on the ground that the old territory owed debts, for the presumption is that value was received which inures to the benefit of those residing within the territory annexed. *Ibid.*

MUNICIPAL CORPORATIONS—*Continued.*

7. *Discretionary Powers — Public Welfare — Shade Trees — Condemnation Proceedings.*—The Courts will not interfere with the exercise of discretionary powers conferred upon municipal corporations for the public welfare, unless their action should be clearly so unreasonable as to amount to an oppressive and manifest abuse of their discretion; and, when in the exercise of their proper discretion, the authorities order shade trees along the sidewalks in front of a citizen's residence to be cut down to the injury of his property, for the preservation of the city sewerage, a restraining order should not be granted. (*Tate v. Greensboro*, 114 N. C., 392, cited and applied). *Rosenthal v. Goldsboro*, 128.

8. *Discretionary Powers — Public Welfare — Condemnation Proceedings—Shade Trees—Notice—Damnum Absque Injuria.*—When a municipality, within the proper exercise of its discretionary powers, conferred upon them for the welfare of the public, condemn the trees on the sidewalk in front of the property of the citizen, no legal right of the citizen is infringed upon, and no previous notice to him is required. The injury, if any suffered by him, is *damnum absque injuria.* (*Brown v. Electric Co.*, 138 N. C., 533, cited and distinguished). *Ibid.*

9. *School Boards—Discretion—School Districts.*—In the absence of misconduct, or of violation of some provision of statute, the action of a school board in dividing townships into school districts and in the erection and maintenance of school buildings, cannot be supervised or restrained by the courts. Revisal, secs. 4116, 4121, 4124. *Pickler v. Board of Education*, 221.

10. *School Districts—Discretion—Rebuilding School-house—Proximity to Another School.*—When a school board, acting according to its judgment, without misconduct on its part, or in violation of some provision of statute, rebuilds a school-house on an old site, though in less than three miles of some school already established, it is not a violation of Revisal, 4129, providing that no new school shall be established within that distance of another. *Ibid.*

11. *Streets—Assessments, Validity of—Statutory Requirements.*—An assessment for a street improvement according to frontage as directed by the statute is valid. *City of Kinston v. Loftin*, 255.

12. *Same—Due Process—Constitutional Law.*—A statute authorizing such an assessment which provides for a notice that will enable the property owner to appear before some authorized tribunal and contest the validity and fairness of the

MUNICIPAL CORPORATIONS—*Continued.*

assessment before it becomes a fixed charge on his property is not open to the objection that it deprives the owner of his property without due process of law. *Ibid.*

13. *Same—Notice—Remedies.*—The action of a municipality to enforce the collection of a special assessment against the property of a citizen, when in strict accordance with the provisions of a statute authorizing it, is not invalid or unconstitutional on the ground that previous notice of the assessment was not given, when the statute gives the citizen the right to set up every available defense in the action pending. *Ibid.*

14. *Ordinances—Aesthetic Considerations—Private Rights—Police Powers.*—It is not within the police power of a municipality to regulate the placing and height of billboards on the land of the owner, and a penalty prescribed and imposed upon the owner for violating the provisions of such ordinance of the city of Asheville, is not enforcible. (*Small v. Edenton,* 146 N. C., 527; *Tate v. Greensboro,* 114 N. C., 399, cited and distinguished). *State v. Whitlock,* 542.

MURDER.

1. *Evidence—Threats Previously Made.*—Upon trial under indictment for murder, evidence is competent of threats made by prisoner against the deceased two weeks before the homicide. *State v. Stratford,* 483.

2. *Conspiracy — Relationship—Evidence—Jealousy.*—The defendants, a man and woman, were tried for murder and both convicted, there being evidence that the former procured the latter to do the act, or conspired with her to that end. ***Held,*** evidence that prisoner and deceased were in lewd intimacy with *feme* defendant was competent both as showing her relationship with the defendant and jealousy as a motive for the homicide. *Ibid.*

3. *Evidence of One Offense—Instructions—Guilty of Certain Offense or Acquittal.*—When, under an indictment for murder, the solicitor has elected not to prosecute for the capital offense, and the evidence points either to suicide of deceased or killing with premeditation of the prisoner, it was not error in the lower Court to charge the jury that they must render a verdict of guilty of murder in the second degree, or of acquittal. *Ibid.*

4. *Evidence, Circumstantial — Motive — Instructions — Harmless Error.*—It is not necessary to prove motive in order to convict upon a trial for murder, but when circumstantial evidence is relied on, it may be shown to strengthen the chain

MURDER—*Continued.*

of circumstances tending to establish guilt. Where the trial Judge charged that motive was a strong circumstance pointing to guilt, but also charged that failure to show motive was a strong circumstance pointing to innocence, no error prejudicial to defendant's right was committed. *Ibid.*

5. *Defense—Insanity—Evidence—Opinion—Non-Expert Witnesses—Mental Capacity.*—When the defense of insanity is pleaded by the prisoner on trial under indictment for murder, it is competent for non-expert witnesses to testify, from their own personal experience and contact with the prisoner for a period immediately preceding the act of killing, stating the facts and circumstances from which they derive their opinion, that the prisoner knew, and on the day in question knew, it was wrong to kill the deceased in the manner testified to, or established. *State v. Banner*, 520.

6. *Evidence — Opinion Evidence — Marks of Shooting.* — Upon a trial for murder by shooting, it is competent for a witness to testify, from his own observation of facts, that there was other evidence of shooting besides the wound on the dead body, as, for instance, bullet holes, bullet marks on surrounding objects, and fresh and empty shells. *State v. Peterson*, 523.

7. *Admissions, Effect of—Malice—Burden of Proof.*—Upon a trial for murder in the second degree, testimony by a State's witness of declarations of defendant subsequent to the killing that he had to kill deceased, the killing with a deadly weapon being admitted, is but an admission of the homicide alone, raising, in law, the presumption of malice, and puts the burden of showing self-defense or manslaughter upon the prisoner. *Ibid.*

8. *Admissions, Effect of—Instructions Ambiguous.*—Upon a trial for murder there was testimony that "the witness said to the prisoner: 'I saw the body. I guess you had to kill him (the deceased),'" to which the prisoner answered, "Yes." The defendant requested the Court to instruct the jury that there was insufficient testimony to go to the jury, leaving out this conversation, to connect the prisoner with the homicide; and that "if the answer of the prisoner, consisting of one word only, satisfies you beyond a reasonable doubt that the prisoner killed the deceased, and the same answer raises a reasonable doubt in your minds whether the killing was of necessity and without fault on his part, then you will acquit the prisoner." *Held*, the instruction was too ambiguous, if for no other reason, to lay the foundation of self-defense. *Ibid.*

MURDER—*Continued.*

9. *Conviction in Second Degree — Instructions — Evidence as to First Degree.*—When, upon trial for murder, the prisoner has been convicted of murder in the second degree, there is no reversible error in the refusal of the trial Judge to charge that there was no evidence sufficient for conviction of murder in the first degree. *State v. Fisher*, 557.

10. *Evidence—Character of Deceased—Self-Defense.*—When, upon a trial for murder, the prisoner has not testified, and the only evidence of the manner of killing was given by eyewitnesses, containing no element of self-defense, testimony of the dangerous character of the deceased should be excluded, on objection. *Ibid.*

11. *Character Witness—Instructions—Weight of Evidence.*—Upon a trial for a felony, the Judge charged the jury: "You should likewise consider the evidence as to the character of the (defendant's) witnesses, whether that evidence was elicited from the witnesses themselves, on cross-examination, or otherwise, or whether it was told by witnesses who were called to testify as to the character of the other witnesses." *Held*, no error, when, immediately following, he instructed the jury, in effect, that such evidence only went to the weight and credibility of the testimony in each instance. *State v. Cloninger*, 567.

12. *Same—Defendant a Witness.*—When a defendant on trial for a felony goes upon the stand in his own behalf without offering evidence as to his own character, the credibility of his testimony is in question, and the State may introduce evidence tending to show his bad character when it is confined to the purpose of contradiction, or of impeaching his evidence. *Ibid.*

13. *Defendant a Witness — Character — Substantive Evidence.* — Evidence as to the character of defendant on trial for murder is substantive, when he goes upon the witness stand and introduces evidence of his good character. *Ibid.*

14. *Character Witnesses — Defendant a Witness — Examination.*—For the sole purpose of contradicting his testimony, it is competent for the State to cross-examine a defendant, a witness in his own behalf, on trial for murder, when he has introduced no evidence as to his character; and the cross-examination is not restricted to matters brought out on direct examination. Revisal, sec. 1634. *Ibid.*

15. *Insanity—Presumption—Burden of Proof.*—The presumption is that a prisoner on trial for murder was sane at the time of the homicidal act, with the burden on him to prove the contrary. *Ibid.*

MURDER—*Continued.*

16. *Same—Evidence—Instructions.*—Under the "transitory homicidal plea," the prisoner, on trial for murder, testified: "I guess I was unconscious . . . I saw (deceased) coming towards me . . . He said he was going to kill me, I thought he was. I then struck him." This blow was the homicidal act. The following instruction was held no error: "If the prisoner was in a state of mind at the time of the homicidal act to comprehend his relation to others, or, knowing the criminal act, was conscious that he was doing wrong, he was responsible; otherwise, he was not." (*State v. Branner, ante,* 559, cited and approved). *Ibid.*

17. *Manslaughter — Aider and Abettor — Evidence Sufficient.* — When one of the prisoners was present at the time deceased was killed, and, with others, followed deceased, cursing him, and got a baseball bat away from him with which another person struck the fatal blow, there is abundant evidence to sustain his conviction of manslaughter as an aider and abettor. *Ibid.*

NEGLIGENCE. See Contributory Negligence.

1. *Evidence — Burden of the Issue — Burden of Proof — Instructions.*—In an action to recover damages to plaintiff's property alleged to have been negligently caused by sparks emitted from defendant's passing engine, when there was evidence tending to show negligence. *Held,* (1) It was error in the trial Judge to charge the jury, in effect, that if they found the evidence to be true there would be a presumption in law of defendant's negligence, and the burden of proof would be upon defendant to show to the contrary; (2) Plaintiff's evidence made out a *prima facie* case to the extent only of carrying the case to the jury to find whether or not the injury was caused by defendant's negligence; (3) The burden of the issue does not shift from plaintiff, while the burden of proof may do so. (*Winslow v. Hardwood Co.,* 147 N. C., 275, cited and approved). *Cox v. R. R.,* 117.

2. *Railroads — Duty of Employer — Evidence Sufficient.*— In an action for damages for personal injury, evidence of negligence is sufficient to take the case to the jury which tends to show, that, on a dark night, without the customary signal or warning, except the rumbling noise caused by its approach, an engine, which had been coupled to the train, but had gone for water, returning and making a coupling to the train, struck the train on a level track, with violence, the force being sufficient to drive the entire train of twenty-two cars back to the distance of from a car and a half to two-car lengths, just as the plaintiff, in the discharge of his duties as em-

NEGLIGENCE—*Continued.*

ployee, was getting into the cab of his engine coupled at the other end of the train, thereby throwing him in front of his engine onto the track ahead, and causing the injury complained of. *Meacham v. R. R.*, 147.

3. *Railroads—Death by Wrongful Act—Evidence—Questions for Jury.*—In an action for damages claimed for a wrongful death owing to defendant's negligence, evidence should be submitted to the jury which tends to show, that on a dark night, about half an hour after plaintiff's intestate was seen at defendant's station, defendant's train came by at high speed, without headlights, and gave no warning or signals, at the proper places, which would indicate to plaintiff's intestate its approach; that, when last seen, plaintiff was drinking and eating peanuts, and was found at daylight the next morning in a dying condition, with injuries indicating that he had been struck by defendant's train, and with indications on his clothes, and on the ground near him, that, at or shortly before the time he was injured, he was eating peanuts. *Thompson v. R. R.*, 155.

4. *Evidence Conflicting—Question for Jury—Nonsuit.*—A motion as of nonsuit upon the evidence should be denied, in an action to recover damages alleged to have arisen from defendant's negligence, when the testimony tends to show that the injury was caused by an improper order of a vice principal, given to plaintiff in the course of his employment, and that the plaintiff was not negligent in doing the work. *Rushing v. R. R.*, 158.

5. *Master and Servant—Fellow Servants.*—A negligent and careless act of a fellow servant in throwing down the end of a log which the plaintiff, in the scope of his employment, was helping to carry, will render the employer (a railroad company) liable in damages, if the proximate cause of an injury to the plaintiff. *Ibid.*

6. *Railroads—Wanton Negligence—Evidence—Insufficient.*— Mere forgetfulness, whatever the consequences, does not constitute a wilful or wanton neglect of duty; for the words imply that the act was knowingly and purposely done. Therefore, when the evidence does not disclose that leaving a switch open, which caused the injury, was knowingly done, or done in utter disregard of the consequences, it is not sufficient to sustain a verdict for damages found to be occasioned by "wanton negligence" on the part of the railroad company, or its employees. *Bailey v. R. R.*, 169.

7. *Master and Servant—Fellow Servant—Vice Principal—Respondeat Superior.*—When an order negligently given by a vice principal, present at the time and directing the work, obedi-

NEGLIGENCE—*Continued.*

ently carried out by one fellow servant, immediately caused the injury to the other one, the negligence is imputed to the principal, and a prayer for instruction is properly refused, to the effect, that if the plaintiff was injured, under such circumstances, by the misconduct of a co-employee, he could not recover. *Wade v. Contracting Co.*, 177.

8. *Master and Servant—Fellow Servant—Recovery.*—In an action by an employee to recover damages for personal injury alleged to have arisen from a negligent act, if the negligence of the employer and a fellow employee concurs in producing the injury, the injured employee can recover of either, if he himself is free from blame. *Ibid.*

9. *Same — Evidence — Nonsuit.*— The plaintiff, nineteen years of age, was employed chiefly to keep the books of defendant company. The vice principal of defendant, who was directing the work, called plaintiff to assist in raising a pile driver by helping to work some jackscrews, placed for the purpose. There was evidence tending to show that the injury complained of was caused by the jackscrew being insecurely placed and certain timbers used in connection with them insecurely fastened, and in consequence of an ill-considered and negligent order, given by the vice principal. *Held*, there was sufficient evidence of negligence to be submitted to the jury, and a motion as of nonsuit upon the evidence was properly refused. *Ibid.*

10. *Master and Servant—Safe Appliances—Damages.*—In an action for damages for injuries received, alleged to have been the result of improper instruments given by the employer to the employee with which the latter was to do the work entrusted to him, the liability of the former, in damages, depends upon whether he was negligent in respect to the instrumentalities provided. *Cotton v. R. R.*, 227.

11. *Same—Proof Required.*—For the recovery of damages for injury alleged to have been caused to an employee by reason of the negligently furnishing by the employer improper implement with which he was to perform his work within the scope of his employment, the former, to establish his case, must show: (1) That the implement furnished by the master was, at the time of the injury, defective; (2) That the master knew of the defect, or was negligent in not discovering it and making needed repairs; (3) That the defect was the proximate cause of the injury. (In this case, the question as to the duty of the servant to inform the master of the defect did not arise upon the evidence). *Ibid.*

12. *Master and Servant—Safe Appliances—Knowledge of Defect—Inspection.*—The employer must not only use ordinary care

NEGLIGENCE—*Continued.*

and diligence to provide safe and suitable implements for the employee to do the work required of him, but he must exercise a reasonable supervision over them and ordinary care in keeping them in safe condition. When an employee is injured by a defective truck on which he was required to carry trunks to a train at defendant's station, and there is evidence that a pin keeping a wheel on had been worn by constant use so that it gave way, resulting in the injury complained of, the question is for the jury to say whether, by a careful inspection, the defendant should have discovered the defective condition. *Ibid.*

13. *Traction Engine — Highways — Nuisance—Reasonable Time—Questions for Jury.*—In a suit for damages occasioned by plaintiff's horse being frightened by a broken down traction engine left to one side of a public highway, it is for the jury to say, upon the question of negligence, whether the defendant delayed an unreasonable length of time in having it repaired and in taking it away. *Davis v. Thornburg*, 233.

14. *Issues—Wilful Negligence—Harmless Error.*—An issue as to wilful negligence is not prejudicial to defendant which goes only to the quantum of damages, when there was evidence of defendant's negligence, and the amount of damages was agreed upon in the event the jury found the affirmative of the question of negligence. *Reeves v. R. R.*, 244.

15. *Railroads—Lights—Signals—Crossings—Evidence—Nonsuit.* — Plaintiff's intestate was killed by defendant's train, consisting of an engine and twenty freight cars, backing along its track on a dark night, without signals or warnings, and without lights on the rear car from the engine. At the place of the injury was an embankment on which was a track of another company running parallel with that of defendant. The injury occurred while plaintiff, an employee, was going home from his work, and crossing the tracks at a place where, to defendant's knowledge, people usually crossed. The evidence tended to show that on top and about the middle of the train were two men standing with lighted lanterns. *Held*, a judgment as of nonsuit upon the evidence should not be sustained, as the question was for the jury to determine whether the lanterns could have been readily seen at the time, and under the circumstances, by an observant person on the ground. *Allen v. R. R.*, 258.

16. *Employer and Employee—Employee—Construction of Scaffold —Vice Principal.*—When an employee has been instructed by the employer to do certain work upon a scaffold, and he was injured, owing to a negligent and faulty construction of the

NEGLIGENCE—*Continued.*

scaffold by another employee entrusted to build it, it is not necessary that the employee entrusted to build the scaffold be a vice principal, in order to hold the employer liable for an injury which is the proximate cause of the negligent act. *Barkley v. Waste Co.*, 287.

17. *Contributory Negligence—Instructions—Verdict, Facts Established By.*—When the question of defendant's negligence is dependent upon whether the engineer stopped the train in an unusually rough or jolting manner, and the Court charges the jury to find the appropriate issue for defendant if the engineer stopped it in the usual or ordinary manner, a verdict in plaintiff's favor establishes the defendant's negligence; and, further, when the Court charges the jury to answer likewise in defendant's favor if the plaintiff did not take all ordinary precautions to protect himself against all shocks or jolts, a verdict in plaintiff's favor clears him of contributory negligence. *Bull v. R. R.*, 427.

18. *Same—Irrelevant Questions—Harmless Error.*—When it has been established by the verdict of the jury, that, through defendant's negligence, without contributory negligence on plaintiff's part, plaintiff was thrown from the top of a car and injured, the burden being on plaintiff, his having introduced immaterial evidence relating to a defective brake wheel, upon which he was thrown, is harmless error, as the questions arising therefrom could not affect the result. *Ibid.*

NEWLY DISCOVERED EVIDENCE. See Evidence, 23.

NEW TRIAL. See Issues, 3, 7; Appeal and Error, 2.

NEXT FRIEND. See Parties, 1.

NON-RESIDENT. See Process, 2.

NONSUIT.

1. *Evidence—Motions—Waiver.*—A motion as of nonsuit upon the evidence, made at the close of plaintiff's evidence and not renewed at the close of all the evidence, is waived. *Teal v. Templeton*, 32.

2. *Evidence—Contributory Negligence.*—Evidence tending to show that defendant railroad company negligently caused plaintiff to be thrown to the ground, and inflicted the injury complained of, while his train was on a siding at a regular station without apparent danger from approaching trains, and that he was acting under the instruction of his superiors in charge, or with their knowledge and approval, is not affected by the fact that he was not acting under a rule made

NONSUIT—*Continued.*

for the protection of trains when on the main line, so as to raise the question of contributory negligence; and a judgment of nonsuit upon the evidence based on this contention is propertly refused. *Meacham v. R. R.*, 147.

3. *Evidence — Questions for Jury.* — In an action for damages alleged to have arisen from a wrongful death, if there is any evidence tending to show that the death was the result of defendant's negligence, it should be submitted to the jury, and a motion as of nonsuit upon the evidence disallowed. *Thompson v. R. R.*, 155.

4. *Negligence — Evidence Conflicting — Questions for Jury.* — A motion as of nonsuit upon the evidence should be denied, in an action to recover damages alleged to have arisen from defendant's negligence, when the testimony tends to show that the injury was caused by an improper order of a vice principal, given to plaintiff in the course of his employment, and that the plaintiff was not negligent in doing the work. *Rushing v. R. R.*, 158.

5. *Same—Evidence.*—The plaintiff, nineteen years of age, was employed chiefly to keep the books of defendant company. The vice principal of defendant, who was directing the work, called plaintiff to assist in raising a pile driver by helping to work some jackscrews, placed for the purpose. There was evidence tending to show that the injury complained of was caused by the jackscrew being insecurely placed and certain timbers used in connection with them insecurely fastened, and in consequence of an ill-considered and negligent order, given by the vice principal. *Held*, there was sufficient evidence of negligence to be submitted to the jury, and a motion for judgment as of nonsuit upon the evidence was properly refused. *Wade v. Contracting Co.*, 177.

6. *Evidence, How Construed.*—Upon a motion as of nonsuit upon the evidence, the evidence must be construed in its most favorable light to the plaintiff. *Cotton v. R. R.*, 227.

7. *Boundaries—Recognition—Acquiescence.*—While recognition of and acquiescence in a division line may not, as a rule, justify a departure from the true dividing line, when, otherwise clearly established; when it is not so established, and plaintiff claims that defendant has built beyond it upon his land, evidence on the question of boundary is sufficient to go to the jury which tends to show, that upon each of the adjoining lots of plaintiff and defendant there had formerly been two wooden stores, subsequently destroyed by fire, so close together that their eaves had the same drip, causing the same trench on the ground by waters falling from them; that, to

NONSUIT—*Continued.*

ascertain the correct dividing line, plaintiff had measured the distance between the brick pillars along the middle of the line caused by the common drip, and that the brick building then constructed by him without objection from defendant's grantor, had its walls on his own land twelve inches back from the line as ascertained; and in such case an order of nonsuit for want of any evidence of location was erroneous.

8. *Railroads—Negligence—Lights—Signals—Crossings—Evidence.*—Plaintiff's intestate was killed by defendant's train, consisting of an engine and twenty freight cars, backing along its track on a dark night, without signals or warnings, and without lights on the rear car from the engine. At the place of the injury was an embankment on which was a track of another company running parallel with that of defendant. The injury occurred while plaintiff, an employee, was going home from his work, and crossing the tracks at a place where, to defendant's knowledge, people usually crossed. The evidence tended to show that on top and about the middle of the train were two men standing with lighted lanterns. *Held,* a judgment as of nonsuit upon the evidence should not be sustained, as the question was for the jury to determine whether the lanterns could have been readily seen at the time, and under the circumstances, by an observant person on the ground. *Allen v. R. R.*, 258.

9. *Evidence.*—When there is some evidence that defendant had acknowledged his liability for a debt sued on, a motion for judgment as of nonsuit upon the evidence should be disallowed. *Laney v. Hutton*, 264.

10. *Appeal and Error—Evidence—Trial—Per Curiam Not to Prejudice Rights.*—In this case, the Court held that there was sufficient evidence to go to the jury, and that a judgment as of nonsuit, upon the evidence should not have been allowed. The evidence was not discussed, as such might prejudice one or the other of the parties to the litigation upon the new trial granted. *Cooper v. Rowland*, 353.

NOTICE.

1. *Arbitration — Appointment of Third Arbitrator — Parties — Hearing—Invalid Award.*—When parties submit a matter in controversy to the decision of two arbitrators, with power, in case of disagreement, to call in a third arbitrator, they must, in the absence of an agreement to the contrary, be notified of the appointment of the third arbitrator, the time and place of meeting to determine the controversy, with an opportunity to introduce their evidence and submit arguments as in the original hearing, and failure to give such

NOTICE—*Continued.*

notice and hear the testimony will invalidate the award at the instance of either party to the controversy. *Bray v. Staples*, 89.

2. *Execution—Issuance—Time to Issue—Statutes.*—Under Revisal 1905, secs. 619, 620, authorizing a party to proceed to enforce a judgment by execution within three years, and requiring notice to defendant before issuance of execution, where no execution has been issued within three years, the issuance of an execution after three years without notice is only an irregularity, and a sale without objection gives to a stranger, purchasing without notice, title to the property. *McKeithen v. Blue*, 95.

4. *Municipal Corporations — Discretionary Powers — Public Welfare — Condemnation Proceedings — Shade Trees — Damnum Absque Injuria.*—When a municipality, within the proper exercise of its discretionary powers, conferred upon them for the welfare of the public, condemn the trees on the sidewalk in front of the property of the citizen, no legal right of the citizen is infringed upon, and no previous notice to him is required. The injury, if any suffered by him, is *damnum absque injuria.* (*Brown v. Electric Co.*, 138 N. C., 533, cited and distinguished). *Rosenthal v. Goldsboro*, 128.

5. *Partnership—Credit Given—Statement of Partnership—Credit Agency—Error.*—When a person notifies a credit agency that information previously given to it, that he was a member of a certain firm, was erroneous, he is not responsible to those of its patrons selling to the firm, relying upon the information that he was a member, after a reasonable time given the agency to notify them of the error. *Rheinstein v. McDougall*, 252.

6. *Partnership—Principal and Agent—Notice to Produce Letters —Attorney and Client.*—Defendant informed a credit agency in reply to its request, by letter, that he was a member of a certain firm. The agency, by its general method, informed its patrons, and one of them advanced credit to the firm upon the faith of the defendant's being a partner. Thereafter, defendant notified the agency by letter, of which no copy was made, that his former letter was erroneous and that he was not one of the firm. The patron of the agency sued defendant to recover for goods sold and delivered. Notice to produce the second letter was given in ample time, before trial, to the attorney of plaintiff and to a local branch of the agency. *Held*, (1) Parol evidence of the contents of the letter was admissible upon failure of plaintiffs to produce letter; (2) The credit agency was the agent of the principal,

NOTICE—*Continued.*

and notice to the principal's attorney was sufficient; (3) The reply to notice to the local branch that all correspondence had been sent to an office of the credit agency beyond the State, was insufficient. *Ibid.*

7. *Constitutional Law—Due Process—Remedies.*—The action of a municipality to enforce the collection of a special assessment against the property of a citizen, when in strict accordance with the provisions of a statute authorizing it, is not invalid or unconstitutional on the ground that previous notice of the assessment was not given, when the statute gives the citizen the right to set up every available defense in the action pending. *City of Kinston v. Loftin*, 255.

8. *Telegraph Companies—Parties—Issues Insufficient—Judgment—Relationship.*—In a suit against a telegraph company by the wife for damages in negligently transmitting and delivering a message announcing a death, sent to the husband, upon the face of which she does not appear as a party in interest, it is necessary to a judgment for her that an issue be submitted to, and found in her favor by, the jury, as to whether she is beneficially interested therein; and a finding that the relationship between the deceased and plaintiff was that of sister, is not sufficient, as it shows no causal connection between the injury and the negligence complained of. *Holler v. Telegraph Co.*, 336.

NUISANCE.

Negligence — Traction Engine — Highways — Reasonable Time — Questions for Jury.—In a suit for damages occasioned by plaintiff's horse being frightened by a broken down traction engine left to one side of a public highway, it is for the jury to say, upon the question of negligence, whether the defendant delayed an unreasonable length of time in having it repaired and in taking it away. *Davis v. Thornburg*, 233.

OBJECTIONS AND EXCEPTIONS. See Appeal and Error, 7, 12.

1. *Appeal and Error — Evidence Rejected — Harmless Error.* — When the damages sought are those arising from a fright received by plaintiff's horse caused by a traction engine left by defendant to one side of a public highway, it is harmless error for the trial Judge to exclude evidence tending to show the gentle nature of the horse, when uncontradicted evidence to the same effect was subsequently admitted. *Davis v. Thornburg*, 233.

2. *Evidence — Declarations — Appeal and Error.* — Declarations made by a party and testified to on the direct examination

OBJECTIONS AND EXCEPTIONS—*Continued.*

by a witness, not objected to at the time, and gone fully into on cross-examination, cannot be considered on appeal. *Laney v. Hutton*, 264.

3. *Appeal and Error—Instructions—Verdict, Directing—Broadside Exceptions.*—A general exception to an instruction for the jury to find for the plaintiff upon the whole evidence is not too indefinite, or defective as a broadside exception. *Woodbridge v. Brown*, 299.

4. *Evidence—Instructions as to Admissions—Appeal and Error.*—An assignment of error to the charge of the trial Judge, in stating an admission of fact, will not be considered on appeal, as such matters are for him to settle; and if no such admission was made, objection should be made at the time so that he may correct the error. *State v. Lance*, 551.

OBSTRUCTED VIEW. See Railroads, 1, 2.

OPINION. See Evidence, 87.

OPINION EVIDENCE. See Evidence, 8, 22, 92.

OPINION FORMED AND EXPRESSED. See Jurors, 4.

OPTIONS. See Contracts, 12.

ORDERS. See Clerk of Court, 2.

ORDINANCES. See Municipal Corporations, 14.

ORDINANCES. See Railroads, 3.

ORIGINAL PAPERS. See Partition, 4.

OUSTER. See Entry and Ouster, 1.

OWELTY. See Husband and Wife, 4.

PARDONS.

1. *Executive Pardons Upon Condition—Constitutional Right to Grant.*—The Governor is given the power to grant a pardon upon a condition precedent that the prisoner pay costs of trial; and upon condition subsequent, that he remain of good character, and be sober and industrious. Constitution, sec. 6, Art. III. *In re Williams*, 436.

2. *Executive Pardon—Defenses—Procedure.*—A pardon can only be issued after conviction, and therefore it is impossible to plead it as a bar to the prosecution. The remedy is in *habeas corpus* proceedings. *Ibid.*

3. *Executive Pardons—Requisites—Acceptance.*—An acceptance of a pardon is essential to its operative effect, as a condition

PARDONS—*Continued.*

may be annexed rendering it more objectional than the offense of which the prisoner was convicted. *Ibid.*

4. *Executive Pardons—Requisites—Delivery.*—The delivery of a pardon is one of its essential requisites; and its delivery to the prisoner's attorney is a constructive delivery to the prisoner. *Ibid.*

5. *Executive Pardons—Conditions Precedent and Subsequent—Effect of Acceptance and Delivery.*—After delivery and acceptance of a pardon with conditions precedent and subsequent, it is irrevocable upon the compliance by the prisoner with the condition precedent, unless he shall violate the conditions subsequent by his conduct after the release. *Ibid.*

6. *Same—Return of Pardon by Sheriff.*—The sheriff, by returning a pardon after its delivery and acceptance by the prisoner, cannot defeat or impair its legal results. *Ibid.*

PAROL EVIDENCE. See Evidence.

PARTICULARS, BILL OF. See Indictment, 4, 5.

PARTIES.

1. *Jurisdiction—Justice of the Peace — Infant — Appointment of Next Friend.*—There being no statutory special method indicated by which a next friend may be appointed to represent an infant in an action properly brought in a Justice's court, Revisal, secs. 405, 1473, the rule prescribed by the Supreme Court, Revisal, sec. 1541, applies, and thereunder the appointment should be made by the Justice of the Peace, using the same care and circumspection in investigating the fitness of the person to be appointed as is required by the Clerk, in actions properly brought in the Superior Court. *Houser v. Bonsal*, 51.

2. *Judgments—Justice of the Peace—Infant—Guardian ad Litem, Appointment of — Procedure — Irregularity — Ratification.*—A judgment rendered by a Justice of the Peace in favor of an infant plaintiff, and paid, will not be set aside by direct proceedings, between the same parties for the same cause of action, solely upon the ground that the next friend of the infant in the suit was appointed by the Clerk of the Court. At most, the action of the Clerk would be but an irregularity, which the Justice of the Peace may subsequently ratify by the subsequent proceedings. *Ibid.*

3. *Contracts — Options — Rights.*— Defendant contracted with N. Bros. to give them an option on his stock, in an incorporated company, with the privilege of buying at any time within three years. He afterwards placed the stock in the hands of

PARTIES—*Continued.*

a trustee for the purpose of securing the performance of a contract made with K. with direction to sell to "some parties agreeable to N. Bros." In an action by K. against defendant, and the trustee, to compel the latter to sell the stock, N. Bros. were made parties defendant and asserted their rights under the option contract. *Held*, that an order to sell the stock should not have been made until the rights of N. Bros. had been passed upon. K. and the trustee took the stock subject to the rights of N. Bros. *Kuker v. Snow*, 181.

4. *Telegraph Companies—Notice—Issues Insufficient—Judgment—Relationship.*—In a suit against a telegraph company by the wife for damages in negligently transmitting and delivering a message announcing a death, sent to the husband, upon the face of which she does not appear as a party in interest, it is necessary to a judgment for her that an issue be submitted to, and found in her favor by, the jury, as to whether she is beneficially interested therein; and a finding that the relationship between the deceased and plaintiff was that of sister, is not sufficient, as it shows no causal connection between the injury and the negligence complained of. *Holler v. Telegraph Co.*, 336.

5. *Lack of Parties—Judgments—Irregularities—Equities.*—A final judgment of a Court having jurisdiction of the parties and subject matter will not be set aside for irregularities, when it appears that all of the parties in interest are not before the Court so that the equities may be administered and full and complete justice done. *Lanier v. Heilig*, 384.

6. *Contracts to Convey Lands—Equity—Imperfect Title.*—Specific performance of a contract to convey an indefeasible title to lands will not be enforced in equity against a purchaser, at the suit of one having the life estate, when those in remainder have not been made parties and would not be bound by the decree. *Triplett v. Williams*, 394.

PARTITION.

1. *Lands—Procedure—Appeal—Duty of Clerk—Superior Court.*—Under proceedings for the partition of lands, when an appeal is taken from the decision of the Clerk (Revisal, secs. 610 and 611), upon issues of law or legal inference, it is his duty to prepare and make a statement of the case and send it to the Judge (Revisal, sec. 612). Under Revisal, sec. 717, when an equitable or other defense is pleaded, the Clerk should transfer the cause to the civil docket, for trial during term, upon the issues raised, and the Judge may allow amendments to the pleadings for the purpose of hearing the case upon its merits. *Little v. Duncan*, 84.

PARTITION—*Continued.*

2. *Lands—Order of Clerk—Revoking Order—Docketing Case for Trial.*—The Clerk may correct a mistake made in prematurely ordering land partitioned, by revoking the order and directing the proceedings to be docketed in the Superior Court. *Ibid.*

3. *Lands — Superior Court Jurisdiction.* — When the Superior Court acquired possession of a case of partitioning land, in term, it should have proceeded therewith according to law, and it was error to remand it to the Clerk. *Ibid.*

4. *Deeds and Conveyances—Proceedings for Division of Lands—Commissioners' Report — Original Papers — Burnt Records—Recording Report.*—When a paper purporting to be an original report of a division of lands, in correct form and signed by the several commissioners, under seal, but which has never been registered, is presented to the Clerk of the court after the court-house has been burned and the records destroyed, with an entry thereon shown to be in the handwriting of a deceased former clerk, that the commissioners made the report in open court, and that the report was confirmed and ordered to be recorded, it is the duty of the Clerk, after satisfying himself upon evidence that the report is the original one, and that the entry is in the handwriting of the former clerk, to have the report recorded, even against the objection of a party in interest, in the absence of suggestion of fraud or that the report was not genuine. *Hill v. Lane*, 267.

5. *Same—Certificate—Color of Title.*—When, after the records of the court have been destroyed by fire, a paper, appearing to be the original report of commissioners to divide lands, with an entry ordering registration made by a former clerk, and which has not before been registered, is recorded by the Clerk and registered, after having satisfied himself of its being the original and genuine, an allotment of a part of the land therein is color of title as to that tract, and a certified copy is competent evidence in an action involving that question. *Ibid.*

6. *Deeds and Conveyances—Color of Title—Commissioners' Report—Recording—Presumption.*—When a certified copy of a report of commissioners to divide land is put in evidence as color of title, by a party in interest claiming a part of the land therein described, it must be presumed, in the absence of proof to the contrary, that the paper was duly recorded in accordance with an order directing it. *Ibid.*

PARTNERSHIP.

1. *Credit Given—Statement of Partnership—Credit Agency—Notice of Error.*—When a person notifies a credit agency that information previously given to it, that he was a member of a certain firm, was erroneous, he is not responsible to those of its patrons selling to the firm, relying upon the information that he was a member, after a reasonable time given the agency to notify them of the error. *Rheinstein v. McDougall*, 252.

2. *Principal and Agent—Notice to Produce Letters—Attorney and Client.*—Defendant informed a credit agency in reply to its request, by letter, that he was a member of a certain firm. The agency, by its general methods, informed its patrons, and one of them advanced credit to the firm upon the faith of the defendant's being a partner. Thereafter, defendant notified the agency by letter, of which no copy was made, that his former letter was erroneous and that he was not one of the firm. The patron of the agency sued defendant to recover for goods sold and delivered. Notice to produce the second letter was given in ample time, before trial, to the attorney of plaintiff and to a local branch of the agency. *Held*, (1) Parol evidence of the contents of the letter was admissible upon failure of plaintiffs to produce letter; (2) The credit agency was the agent of the principal, and notice to the principal's attorney was sufficient; (3) The reply to notice to the local branch that all correspondence had been sent to an office of the credit agency beyond the State, was insufficient. *Ibid.*

PARTY AGGRIEVED. See Penalty Statutes, 8.

PAYMENT. See Evidence, 71; Arbitration, 3.

PENALTY STATUTES.

1. *Carriers of Goods — Demand in Writing — Parol Evidence — Burden of Proof.*—In an action for penalty, under Revisal, sec. 2634, against a carrier for failure to pay or adjust a claim within a specified time after filing it with the carrier's agent, parol evidence was competent to show that plaintiff filed his claim, and was subsequently paid the amount thereof; (1) The contents of the paper were collateral to the controversy and it was not necessary to introduce it in evidence; (2) The writing was in the carrier's possession and could be used for the purposes of contradiction; (3) The burden of proof was on the carrier to show that the claim was not filed, or was excessive. *Rabon v. R. R.*, 59.

2. *Carriers of Goods—Failure to Pay and Adjust Claim—Proviso —Recovery—Full Amount Claimed—Settlement.*—The proviso

PENALTY STATUTES—*Continued.*

that consignee must first recover the full penalty under Revisal, sec. 2634, for the failure of the carrier to pay or adjust a claim under the requirements thereof, is only to protect the carrier against excessive demands and not to discourage settlements for losses. Hence, the plaintiff's right to recover the penalty in such suits is not lost by accepting settlement for damages for full amount claimed after the penalty had accrued. *Ibid.*

3. *Carriers of Goods—Draft—Bill of Lading Attached—Title—Contracts.*—There is no contractual relation between the carrier and a payee of a draft, in a shipment made to consignor's order, "notify," etc., "bill of lading attached to draft," until the draft is paid by him and the title to the goods passes; and until then he cannot recover a penalty in his action against the carrier for delay in their transportation. (*Stone v. R. R.*, 144 N. C., 220, cited and distinguished). *Mfg. Co. v. R. R.*, 261.

4. *Weights and Measures — Interpretation of Statute.* — Revisal, sec. 3073, requires every person using weights and measures to permit the standard-keeper to test them once in every two years, and imposes a penalty upon every person "using, buying or selling" who shall fail to comply with the requirements of the statute. *Held*, that the words "buying or selling" qualify and limit the word "using," imposing the penalty only on those "buying or selling by weights and measures." The history of the legislation in regard to weights and measures reviewed. *Nance v. R. R.*, 366.

5. *Carriers of Goods—Regular Stations—Refusal to Accept Shipment.*—A refusal by the carrier's agent to receive, at its depot, freight, and transportation charges therefor, destined for a point on the carrier's road, which was only a siding, and was not a regular station, is wrongful, and subjects the carrier to the penalty prescribed by Revisal, sec. 2631, when the refusal is on the ground that the agent did not know where the given destination was, and it appears that he could have ascertained that freight was ordinarily shipped there on way bills made out to a regular station on the carrier's road some two miles distant therefrom. *Reid v. R. R.*, 423.

6. *Same—Evidence.*—When a shipment of freight and transportation charges are refused by carrier's agent because he did not know where its given destination was, and it appears that the name given was very slightly changed from that appearing on the "Official Railway Guide and Shipping Guide" used by the carrier; the fact that another agent, who afterwards took the place of the first, promptly learned the location of

PENALTY STATUTES—*Continued.*

the destination and the rate, and gave bill of lading and made shipment, is evidence that the rate and destination could have been ascertained by the first from the information given him, in an action for the penalty prescribed by Revisal, sec. 2631. *Ibid.*

7. *Carrier of Goods — Refusal to Accept Shipment — Commerce Clause—Constitutional Law.*—The penalty arising under Revisal, sec. 2631, from the wrongful refusal of carrier's agent to accept an interstate shipment of freight, bears no relation to the Commerce Clause of the Federal Constitution, for the penalty accrues before the freight is accepted for transportation. *Ibid.*
8. *Carriers of Goods—Refusal to Accept Shipment—"Party Aggrieved."*—The shipper of the goods is the "party aggrieved," and is the one entitled to sue for the penalty prescribed in Revisal, sec. 2631, which arises from the wrongful refusal of the carrier's agent to accept them for transportation. *Ibid.*
9. *Railroads—Sunday, Running of Freight Trains—Permission—Evidence.*—Upon a trial under an indictment against a railroad company for loading, running, etc., a freight train on Sunday, in violation of the provisions of Revisal, 3844, the State must show, beyond a reasonable doubt, that the defendant had permitted the offense to be done; but when the State has shown the wrongful act, it is sufficient for the jury to find that it was done with defendant's permission. *State v. R. R.*, 470.
10. *Same—Reasonable Doubt—Burden of Proof.*—Upon trial for violating the provisions of Revisal, sec. 3844, it is error for the lower Court to charge the jury that the burden was upon defendant to show that a certain freight train was run without its permission, when there is conflicting evidence upon that question; for, in order to convict, they should find as a fact, beyond a reasonable doubt, that the defendant had permitted the running of the train in violation of the statute. *Ibid.*
11. *Railroads — Evidence — Questions for Jury.*— When a *prima facie* case is made out by the State against a railroad company for running its certain train on Sunday, in violation of Revisal, sec. 3844, and the company has introduced evidence tending to prove that it was done without its permission, it is error in the lower Court to charge the jury, if they should find from the evidence that the train in question belonged to the defendant, they should find the defendant guilty, unless its evidence satisfies them that the train was being run without its permission, as the question is exclusively one for the jury. *Ibid.*

PERMANENT INJURIES. See Measure of Damages, 5.

PERMISSIVE LICENSE. See Railroads, 17, 18.

PERMISSIVE USER. See Railroads, 17.

PERSONAL PROPERTY. See Mortgagor and Mortgagee, 1.

PERSONALTY. See Wills, 4.

PLAT. See Deeds and Conveyances, 37.

PLEADINGS.

1. *Demurrer—Amendments—Acquiescence—Practice.*—When the trial Judge sustains a demurrer to the complaint upon the grounds that two or more defendants were improperly joined in an action, to which plaintiff does not except, but obtains leave and amends the complaint to meet the views of the Court, he acquiesces in the judgment upon demurrer and will not be permitted to assign it for error upon an appeal. The better practice would be a request that the action be divided and tried separately. *Rice v. McAdams*, 29.

2. *Amendments—Slander—Conspiracy Alleged—Theory of Trial—Instructions.*—When, owing to an amendment of pleadings, the trial of slander against two defendants joined in the same suit is necessarily upon the theory of conspiracy, and no other, and the issues are not so framed, it is the duty of the trial Judge to try the case upon the amended pleadings, and it is not error for him to so instruct the jury under the issues that they may not be misled by their form. *Ibid.*

3. *Justice of the Peace—Practice.*—Judgment upon a counterclaim set up in an action in a court of a Justice of the Peace cannot be had on the ground that no reply was filed thereto, as the pleadings are oral in that court. *Teal v. Templeton*, 32.

4. *Statute of Frauds.*—When the statute of frauds is relied upon in defense, it must be pleaded, to be available. *Ibid.*

5. *Connected Meaning—Evidence—Admissions.*—When a part of a paragraph of a pleading offered in evidence is so connected with the other part not offered that the whole is necessary to give a connected meaning, it is incompetent. *Rushing v. R. R.*, 158.

6. *Allegations—Proof—Evidence.*—Allegations of the complaint sufficient to sustain a verdict of damages for wanton negligence are ineffectual when not sustained by the proof. *Bailey v. R. R.*, 169.

7. *Admissions—Evidence.*—It is competent for one party to put in evidence a portion of the pleadings of the other containing an allegation or admission of a distinct or separate fact rele-

PLEADINGS—*Continued.*

vant to the inquiry, though it is only a part of the entire paragraph, without introducing qualifying or explanatory matter inserted by way of defense, which does not modify or alter the facts alleged. *Wade v. Contracting Co.*, 177.

8. *Carriers of Passengers—Principal and Agent—Scope of Authority—Ticket Agents—Demurrer.*—A motion to dismiss upon the complaint should be denied, when it is alleged that plaintiff, through her agent, bought of defendant railroad company's agent at its station, S., a ticket from K. to S. under contract that the plaintiff at K. was to be notified at once thereof by defendant's agents, which was not done within six days, through the defendant's carelessness and negligence, whereby plaintiff, who had no money with her, was unduly delayed, to her great damage. *Reeves v. R. R.*, 244.

9. *Joinder of Actions — Demurrer — Misjoinder — Defense by Answer.*—When it appears, both by the summons and Justice's return, in an action brought in this court, that the plaintiff alleged a joint demand against the several defendants, a demurrer of defendants in the Superior Court for misjoinder of separate actions will not be sustained, as the allegations of the complaint must be taken as true, and such defense should be by way of answer. Revisal, sec. 477. *Laney v. Hutton*, 265.

10. *Contract — Warranty — Counterclaim — Allegations.*—Evidence tending to show a breach of warranty in a contract for the sale of goods is competent when the warranty was not specially pleaded. *Woodbridge v. Brown*, 299.

11. *Railroads—Lessor and Lessee—Cause of Action Stated—Jurisdiction — Removal of Causes — Federal Courts.*— When the complaint, in a joint suit against a domestic and foreign railroad corporation, alleges that the latter is a lessee of the former, and that its action in taking plaintiff's land for railroad purposes, the subject of the suit, was unjustifiable under the charter granted by the State to its lessor, but was for a separate and distinct part of the lessee's business, no cause of action is alleged as to the lessor company, and the lessee, when the amount demanded is jurisdictional, can, upon proper proceedings, have the cause removed to the Federal courts. *McCulloch v. R. R.*, 305.

12. *Same.*—Allegations of the complaint that defendant railroad company, a domestic corporation, which had lawfully acquired the lands in question, had leased its road, and charter rights to operate it, to its co-defendant, a foreign corporation, and that, for its separate and distinct purposes, the latter had imposed an additional and unauthorized burden upon the

PLEADINGS—*Continued.*

locus in quo, states a cause of action against the latter company alone, and, upon proper proceedings, the cause is removable to the Federal court, when the amount is jurisdictional. *Ibid.*

13. *Railroads—Jurisdiction—Severable Causes—Removal of Causes—Federal Courts—Amendments.*—When, in a suit brought jointly against a domestic and foreign corporation, in the State courts, the complaint alleges a severable cause of action, and an amendment is made to sufficiently increase the amount involved to confer jurisdiction on the Federal court, upon proper proceedings for removal had by the latter company, the cause is removed *eo instanti* by the force of the statute, and the State courts cannot proceed further, or inquire into the amount of damages plaintiff is legally entitled to recover under the facts stated, or to pass upon the validity of the cause, or permit the amended complaint to be withdrawn. *McCulloch v. R. R.*, 305.

14. *Divorce, Knowledge of Grounds of—Issues—Affidavit—Jurisdiction.*—If it is not required by the statute, Revisal, sec. 1563, that the plaintiff allege in the complaint, in an action for divorce, his knowledge of the grounds therefor at least six months prior to its filing, and such matter is not issuable. The Court acquires jurisdiction when the proper affidavit is made. *Kinney v. Kinney*, 321.

15. *Divorce—Abandonment—Defense—Proof.*—In an action for divorce *a vinculo* brought by the husband against the wife, the defense of abandonment, if relied on, should be set up in the answer, as it is not required of the plaintiff to plead and prove that he has not abandoned his wife, under Revisal, sec. 1564. *Ibid.*

16. *Divorce—Abandonment, Allegations of.*—In an action for divorce *a vinculo* brought by the husband against the wife, an allegation in his complaint that the adultery was committed without the husband's procurement and without his knowledge or consent, and that he has not cohabited with her since he discovered her acts of adultery, does not imply his abandonment of her or put that matter at issue. *Ibid.*

17. *Divorce—Specific Acts—Issues.*—In an action for divorce *a vinculo*, an issue as to a specific act of adultery was properly submitted, if raised by the pleadings and germane to the inquiry. *Ibid.*

18. *Injunctions—Hearing.*—The Judge properly continued the injunction, until the hearing, upon the allegations in the pleadings. *Martin v. Kirkpatrick*, 400.

PLEA IN BAR. See Judgments, 1.

PLEAS.

1. *Retraction — Discretion of Court.*—Whether a prisoner may retract a plea of guilty and enter a plea of not guilty, or *vice versa*, is a matter for the sound legal discretion of the trial Court. *State v. Branner*, 559.
2. *Same.*—The trial Judge can, in his sound discretion, set aside a plea of guilty when, in his judgment, or for other good reason, it appears to have been improvidently entered; but he thereafter has no power to enter a verdict of not guilty and discharge the prisoner. *Ibid.*
3. *Confession—Indictment—Variance.*—Upon a plea of guilty to an indictment the guilt of the prisoner is thereby established, and the plea eliminates all questions of variance between the offense charged and the proof. *Ibid.*

POLICE POWERS. See Municipal Corporations, 14.

POSSESSION. See Vendor and Vendee, 1.

POSSESSION OF DEED. See Principal and Agent, 1.

POSSESSION OF GRANTOR. See Deeds and Conveyances, 46, 47.

POWER OF COURT.

1. *Appeal—Discretion of Court.*—The trial on appeal in the Superior Court from a Justice's judgment is *de novo*, and the Judge may, in his discretion, allow pleadings to be filed. *Teal v. Templeton*, 32.
2. *Appeal and Error—Justice's Court—Motion to Dismiss—Laches—Discretion—Procedure.*—The action of the lower Court is not reviewable in allowing the motion of the appellee, from a judgment rendered in a court of the Justice of the Peace, to docket and dismiss an appeal when the appellant had neither paid the Clerk's fees nor requested him to docket the appeal. *McClintock v. Ins. Co.*, 35.
3. *Executors and Administrators—Trusts and Trustees—Guardian and Ward—Commissions.*—A testator in his will bequeathed certain property to his infant daughter, and should she die leaving no child or children, then to his sister. Persons named were appointed executors and trustees "to carry out and perform the trusts therein declared." By a codicil to the will a guardian for the infant daughter was appointed, and the terms of the will ratified and confirmed in all other respects. *Held*, (1) The appointment of a guardian in the codicil was not inconsistent with the appointment of the trustees by the will to hold and control the property; (2) It

POWER OF COURT—*Continued.*

is not necessary that title to the property be given in express terms, and the trustees, in this instance, are to take over, as trustees, the property from themselves, as executors, and hold and invest the same according to the terms of the will and for the period of time accordingly required; (3) It being conceded that the full income is for the infant daughter, it is to be paid to her guardian during her minority, and, thereafter, to her; (4) The guardian and executors should not receive full commission on account of monies disbursed between them, and the Court should make further and appropriate orders, after due notice, in relation thereto. *Haywood v. Trust Co.*, 208.

4. *Defenses—Pleas Withdrawn—Discretion—Appeal and Error.*—When the defendant in a criminal action has entered the plea of "not guilty," and subsequently desires to withdraw it and enter the plea of "insanity," and no ground was laid by affidavit or otherwise to show that defendant was insane at the time the plea was entered or at the time of trial, it is within the sound discretion of the trial Judge to refuse the withdrawal of the plea, and his action is not reviewable on appeal. *State v. Khoury*, 454.

5. *Same—Witnesses.*—It is competent for the trial Judge, in determining whether he will allow a plea of "not guilty," formerly entered, to be withdrawn and the plea of "insanity" entered in its stead, to permit witnesses, who had seen defendant and had an opportunity to form an opinion as to his mental condition, to express their opinion thereon. *Ibid.*

6. *Railroads—Running Trains on Sunday—Bill of Particulars—Discretion of Court, No Abuse of—Error and Appeal.*—The granting of an order for a bill of particulars to be furnished the defendant railroad company under indictment for running trains on Sunday, in violation of the statute, is in the discretion of the Court, Revisal, sec. 3244; and the question of sufficient compliance is likewise in the sound legal discretion of the trial Judge, and will not be reviewed or disturbed on appeal, unless there has been manifest abuse to defendant's prejudice. *State v. R. R.*, 508.

7. *Same.*—The object of a bill of particulars is to enable the defendant to properly prepare his defense in cases where the bill of indictment, though correct in form and sufficient to apprise the defendant in general terms of the accusation against him, is yet so indefinite in its statements as to the particular charge or occurrence referred to, that it does not afford defendant a fair opportunity to procure his witnesses or prepare his defense. When it appears that the trial Judge

POWER OF COURT—*Continued.*

has, in his discretion, accepted a bill of particulars as being sufficient under an order theretofore granted at the instance of defendant, and that upon a former trial of the same cause the State's witnesses were examined and information so fully given as to render a further bill of particulars unnecessary, the discretion exercised by the trial Judge will not be reviewed on appeal. *Ibid.*

8. *Jurors—Qualification—Motion to Quash—Payment of Taxes—Cause Pending—Plea—Discretion of Court.*—Under the provisions of ch. 36, Laws 1907, an indictment may not be quashed or judgment arrested at any time, because one of the grand jurors had not paid his taxes or had a cause pending and at issue. Formerly, it was discretionary with the trial Judge to allow or refuse such motion after entry of plea until the petit jury was sworn and empaneled, and a motion to quash after entry of plea was made too late as a matter of right. *State v. Banner*, 519.

9. *Jurors—Opinion Formed and Expressed—Trial Judge—Discretion.*—The finding of the trial Judge that a juror is a fair one, though he has formed and expressed an opinion, is a matter in the discretion of the trial Judge, and not reviewable on appeal. *Ibid.*

10. *Remarks of Counsel—Misstatements of Law—Correction.*—It is improper for counsel for defense to argue to the jury matters relevant only to the legal effect of a judgment upon their verdict of insanity, should the jury so find; and it is proper for the Court to correct therein any misstatements of the law calculated to mislead the jury, and instruct them to return a verdict of guilty or not guilty as they may find the fact to be upon the evidence. *Ibid.*

11. *Pleas—Retraction—Discretion of Court.*—Whether a prisoner may retract a plea of guilty and enter a plea of not guilty, or *vice versa*, is a matter for the sound legal discretion of the trial Court. *State v. Branner*, 559.

12. *Same.*—The trial Judge can, in his sound discretion, set aside a plea of guilty when, in his judgment, or for other good reason, it appears to have been improvidently entered; but he thereafter has no power to enter a verdict of not guilty and discharge the prisoner. *Ibid.*

13. *Appeal and Error—Criminal Offense—Erroneous Judgment—Prisoner Discharged.*—The State has no right of appeal from the action of the trial Judge in striking out a plea of guilty and entering erroneously a plea of not guilty and discharging prisoner, upon a trial for an indictable offense, as no jurisdiction thereof is given the Supreme Court by the statute. Revisal, sec. 3276. *State v. Branner*, 559.

POWER OF SALE. See Mortgagor and Mortgagee, 7.

PRACTICE.

1. *Pleadings—Demurrer—Amendments—Acquiescence.*—When the trial Judge sustains a demurrer to the complaint upon the grounds that two or more defendants were improperly joined in an action, to which plaintiff does not except, but obtains leave and amends the complaint to meet the views of the Court, he acquiesces in the judgment upon demurrer and will not be permitted to assign it for error upon an appeal. The better practice would be a request that the action be divided and tried separately. *Rice v. McAdams*, 29.

2. *Justice of the Peace—Pleadings.*—Judgment upon a counterclaim set up in an action in a court of a Justice of the Peace cannot be had on the ground that no reply was filed thereto, as the pleadings are oral in that court. *Teal v. Templeton*, 32.

PREJUDICE. See Appeal and Error, 28.

PRESUMPTION OF FRAUD. See Principal and Agent, 2; Estates, 3.

PRESUMPTIONS.

1. *Instructions—Account Stated—Acceptance—Questions for Jury.*—Upon conflicting evidence, in a suit brought upon an account, it was not error to plaintiff's prejudice for the Judge to charge the jury there would be no legal presumption that the account was presented and accepted by defendant, and should the jury find that it had been presented and accepted, it would devolve upon the defendant to pay it. *Davis v. Stephenson*, 113.

2. *Deeds and Conveyances—Delivery to Third Party—Conditional Delivery—Evidence—Rebuttal.*—The execution and delivery of a deed by the maker to a third person may be accompanied by unqualified instruction to deliver, to make such delivery effectual; and when the testimony of the subscribing and only witness tends but to show that the maker signed the deed, and gave it to a third person with instruction to deliver it to the proper person if he never called for it, and that it was not delivered to the grantee in the lifetime of the maker, the presumption of delivery from the unexplained possession of the grantee and its registration is rebutted. *Fortune v. Hunt*, 358.

3. *Appeal and Error—Prejudice.*—When the offense charged is bailable and the trial Judge orders the prisoner, who was then under bail, into custody in the absence of the jury, and afterwards offers to release the prisoner on bail, without reference to the matter in the presence of the jury, the infer-

PRESUMPTIONS—*Continued.*

ence is that the Judge considered the bond insufficient, and the presumption is that no error was committed. *State v. Lance*, 551.

4. *Murder — Insanity — Burden of Proof.*— The presumption is that a prisoner on trial for murder was sane at the time of the homicidal act, with the burden on him to prove the contrary. *State v. Cloninger*, 567.

PRESUMPTIVE EVIDENCE. See Evidence, 66.

PRIMA FACIE CASE. See Evidence, 9.

PRINCIPAL AND AGENT.

1. *Deeds and Conveyances—Delivery—Possession—Registration—Fraud.*—A deed made by an agent, having general control or supervision of his principal's property, to his principal, found in the agent's safe after his death, unregistered, but among other papers, monies, etc., of the principal, without other proof of constructive or actual possession of the principal, would not be a valid delivery, when there was no special authority to the agent to accept the deed in behalf of the principal; and the failure to register was a circumstance to be considered by the jury upon the question of fraud. *Smith v. Moore*, 185.

2. *Transactions Between — Fraud — Presumption — Burden of Proof.*—When one is the general agent of another, who relies upon him as a friend and adviser, and has entire management of his affairs, a presumption of fraud, as a matter of law, arises from a transaction between them wherein the agent is benefited, and the burden of proof is upon the agent to show by the greater weight of the evidence, when the transaction is disputed, that it was open, fair and honest. *Ibid.*

3. *Independent Purpose—No Question of Agency.*—When a person is acting upon his own intention, and thereby effectuates a conveyance to D. for life and then to his own children, no question as to his acting as the agent of D. is presented. *Condor v. Secrest*, 201.

4. *Carriers of Passengers—Pleadings—Scope of Authority—Ticket Agents—Demurrer.*—A motion to dismiss upon the complaint should be denied, when it is alleged that plaintiff, through her agent, bought of defendant railroad company's agent at its station, S., a ticket from K. to S. under contract that the plaintiff at K. was to be notified at once thereof by defendant's agents, which was not done within six days, through the defendant's carelessness and negligence, whereby plaintiff, who had no money with her, was unduly delayed, to her great damage. *Reeves v. R. R.*, 244.

PRINCIPAL AND AGENT—*Continued.*

5. *Same—Evidence—Questions for Jury.*—Evidence is sufficient to go to the jury upon the authority of defendant's agent at S., a station on its road, to receive money for the purchase of a ticket from K., another station thereon, to S., to be delivered to plaintiff by the agent at K. which shows a receipt for the payment of the ticket at S., stating that it was from K. to S.; a telegram from the agent at S. to the one at K., directing that the ticket, as contended for, be furnished plaintiff; the agent at K. informed plaintiff that he could not furnish it until he had been so advised; the actual furnishing of the ticket as contended for, thereafter, on a regular form used by the defendant for such service. *Ibid.*

6. *Insurance—Contracts—Agent's False Representations—Knowledge Imputed—Liability.*—When an agent of an insurance company has induced the insured to take a policy of insurance in his company by making misrepresentation of a material fact concerning which, as such agent, he should have known the truth, or makes it recklessly, or affirms its existence positively, when he is consciously ignorant whether it be true or false, his principal may be held responsible by the insured relying, and having reasonable ground to rely, upon the agent's statement as importing verity. *Whitehurst v. Ins. Co.*, 274.

7. *Same.*—A stipulation in a policy of life insurance, among other things, gave the plaintiff, the insured, the option to "surrender this policy and withdraw the entire cash value—that is, the legal reserve, computed according to the actuary's table of mortality, and four per cent. interest, together with the dividend." There was evidence tending to show that the agent of the defendant, the insurance company, induced the plaintiff, a blind man, to take out the policy by reading this stipulation to him, and falsely informing him that the company, at the end of ten years, would pay back the premiums with interest. *Held*, (1) It was a question for the jury as to whether these assurances were intended as statements of fact, accepted and reasonably relied upon by plaintiff as a material inducement to the contract; (2) An affirmative finding of the jury thereon established an actionable fraud imputable to defendant company, entitling plaintiff to recover the premiums paid, and interest. *Ibid.*

8. *Telegraph Companies — Address to Third Persons — Questions for Jury.*—The evidence showing a wrongful refusal by telegraph company's agent to receive, for transmission and delivery, a message addressed to a third person, requesting him to inform plaintiff's husband of the dangerous condition of

PRINCIPAL AND AGENT—*Continued.*

his child and for him to come at once, and it appearing that the addressee could readily have given the information to plaintiff in time for him to reach home before the burial of his child, it is for the jury to find whether the addressee as agent of plaintiff would have communicated the information to the husband. *Cordell v. Telegraph Co.*, 402.

9. *Intoxicating Liquors—Procuring Sale—Construction of Statute—Agency.*—Revisal, sec. 3534, making it unlawful for any one to procure for and deliver spirituous liquors to another, and making such person, in law, the agent of the seller, and punishable, though its meaning is not plain, makes the one procuring liquor by purchase from an illicit dealer, in prohibited territory, and delivering it to another, the agent of the seller, and subjects him to the punishment prescribed therein, as a principal in the misdemeanor. *State v. Burchfield*, 537.

10. *Same — Evidence — Incompetent.*— If one buys whiskey for another from an illicit dealer in prohibited territory, without being interested in the sale otherwise than as agent of the purchaser, to whom he delivers it, and pays the money to the seller for the buyer, it is a wrongful procuring of the whiskey of another within the meaning of Revisal, sec. 3534; and his testimony, that he was acting solely as agent for the buyer, cannot change the character of the act from that intended by the statute. *Ibid.*

PRISONER DISCHARGED. See Power of Court, 13.

PRIVATE RIGHTS. See Interpretation of Statutes, 3, 4; Municipal Corporations, 14.

PROBABLE CAUSE. See Malicious Prosecution, 1.

PROCEDURE.

1. *Contracts, Breach of — Damages Present and Prospective.* — When there has been a definite and absolute breach of a contract which is single and entire, all damages, both present and prospective, suffered by the injured party, may and usually must be recovered in one and the same action. *Wilkinson v. Dunbar*, 20.

2. *Slander—Misjoinder of Defendants.*—A joint action may not be maintained against two or more persons for slanderous words spoken, unless the defendants are connected by allegation and proof of a common design and purpose. *Rice v. Adams*, 29.

3. *Appeal and Error—Justice's Court—Appeal Dismissed in Superior Court, Effect of.*—The dismissal of an appeal from a

PROCEDURE—*Continued.*

court of a Justice of the Peace, when not docketed by the appellant at the term of the Superior Court prescribed by Revisal, sec. 608, has the same effect as an affirmation of a judgment thereof under sec. 607, Revisal. *McClintock v. Ins. Co.*, 35.

4. *Appeal and Error—Justice's Court—Motion to Dismiss—Laches—Discretion.*—The action of the lower Court is not reviewable in allowing the motion of the appellee, from a judgment rendered in a court of the Justice of the Peace, to docket and dismiss an appeal when the appellant had neither paid the Clerk's fees nor requested him to docket the appeal. *Ibid.*

5. *Judgments—Justice of the Peace—Infant Parties—Guardian ad Litem—Appointment of—Irregularity—Ratification.*—A judgment rendered by a Justice of the Peace in favor of an infant plaintiff, and paid, will not be set aside by direct proceedings, between the same parties for the same cause of action, solely upon the ground that the next friend of the infant in the suit was appointed by the Clerk of the Court. At most, the action of the Clerk would be but an irregularity, which the Justice of the Peace may subsequently ratify by the subsequent proceedings. *Houser v. Bonsal*, 51.

6. *Superior Court—Justice's Judgments—Plea in Bar—Fraud—Direct Proceedings.*—When, in an action in the Superior Court, the defense is set up that judgment had been entered in the court of a Justice of the Peace, and paid, and in reply the plaintiff assails the judgment on the ground that the action was instituted and the judgment procured by fraud, and with the purpose of depriving the plaintiff of his just demands, the suit in the Superior Court is a proper course to declare the entire proceedings in the Justice's court a nullity, and obtain the relief sought, all the parties in interest being before the Court. *Ibid.*

7. *Partition of Lands—Appeal—Duty of Clerk—Superior Court.*—Under proceedings for the partition of lands, when an appeal is taken from the decision of the Clerk (Revisal, secs. 610 and 611), upon issues of law or legal inference, it is his duty to prepare and make a statement of the case and send it to the Judge (Revisal, sec. 612). Under Revisal, sec. 717, when an equitable or other defense is pleaded, the Clerk should transfer the cause to the civil docket, for trial during term, upon the issues raised, and the Judge may allow amendments to the pleadings for the purpose of hearing the case upon its merits. *Little v. Duncan*, 84.

PROCEDURE—*Continued.*

8. *Judgments, Dormant—Execution Defective—Motions.*—A dormant judgment is not affected by executions made out by, but not issued from, the Clerk's office; and it is open to defendant to move before the Clerk, or before the Superior Court on appeal, that the judgment be declared dormant and that all such executions be recalled, for the reason that no executions had, in effect, been issued. *McKeithen v. Blue*, 95.

9. *Executors and Administrators—Death by Wrongful Act—When Suit Deemed to be Commenced.*—When a suit by a foreign administrator, under Revisal, sec. 59, has been dismissed, and he has subsequently qualified as administrator here, his further proceedings to recover damages for the wrongful act causing the death of his intestate, should be by a separate and independent action; but when he has been permitted by the trial Court, without objection, to become a party to the original suit and amend his pleadings to meet the changed conditions in this respect, his action will be deemed as commenced when he was made a party. (*Hall v. R. R.*, 146 N. C., 345, cited and approved). *Hall v. R. R.*, 109.

10. *Partnership—Principal and Agent—Notice to Produce Letters—Attorney and Client.*—Defendant informed a credit agency in reply to its request, by letter, that he was a member of a certain firm. The agency, by its general methods, informed its patrons, and one of them advanced credit to the firm upon the faith of the defendant's being a partner. Thereafter, defendant notified the agency by letter, of which no copy was made, that his former letter was erroneous and that he was not one of the firm. The patron of the agency sued defendant to recover for goods sold and delivered. Notice to produce the second letter was given in ample time, before trial, to the attorney of plaintiff and to a local branch of the agency. *Held*, (1) Parol evidence of the contents of the letter was admissible upon failure of plaintiffs to produce letter; (2) The credit agency was the agent of the principal, and notice to the principal's attorney was sufficient; (3) The reply to notice to the local branch that all correspondence had been sent to an office of the credit agency beyond the State, was insufficient. *Rheinstein v. McDougall*, 252.

11. *Judgments, Proceedings to Set Aside—Irregularities—Motion in the Cause.*—Proceedings to set aside for alleged irregularities the final judgment of a Court having jurisdiction of the parties and subject matter, should be by motion in the original cause and not by an independent action. *Lanier v. Heilig*, 384.

12. *Same—Lack of Parties—Equities.*—A final judgment of a Court having jurisdiction of the parties and subject matter

PROCEDURE—*Continued.*

will not be set aside for irregularities, when it appears that all of the parties in interest are not before the Court so that the equities may be administered and full and complete justice done. *Ibid.*

13. *Corporations—Dissolution — Statutes — Questions for Court.*—Upon the dissolution at the final hearing of an order restraining a manufacturing corporation from dissolving according to the provisions of Revisal, sec. 1195, in an action brought by a stockholder, when it appears that there are substantial issues involving the adjustment of corporate affairs arising from the pleadings, especially as to indebtednesses between the corporation and plaintiff and defendant, which will require decision by the Court, the proceedings referred to and contemplated by Revisal, sec. 1203, should be carried on and completed in the present action, and include such orders as to the disposition and sale of the plant as may be for the best interests of the assets and of the parties. *White v. Kincaid*, 415.

14. *Executive Pardon—Defenses.*—A pardon can only be issued after conviction, and therefore it is impossible to plead it as a bar to the prosecution. The remedy is in *habeas corpus* proceedings. *In re Williams*, 436.

PROCEEDS OF SALE. See Husband and Wife, 6.

PROCESS.

1. *Execution, Issuance of—Requisites.*—It is necessary for the issuance of an execution that it be actually or constructively delivered to the sheriff, and when it is made out, but not sent out of or issued from the Clerk's office, and memorandum of "execution" is entered on the docket, it is not sufficient, under Revisal, sec. 619, and does not prevent the judgment from becoming dormant. *McKeithen v. Blue*, 95.

2. *Justice's Court—Summons—Service on Non-Resident of County—Appearance—Waiver.*—By entering a general appearance and demurring, a non-resident defendant of the county waives or cures the defect, in proceedings against him in a Justice's court, for want of service of summons ten days preceding the trial, as prescribed by Revisal, sec. 1451. *Laney v. Hutton*, 264.

3. *Judgments—Justice's Court—Summons—Service—Irregularity—Voidable.*—A judgment against a non-resident defendant of the county, obtained in a Justice's court without having had the ten days' previous service of the summons, as required by Revisal, sec. 1451, is not void but irregular, or, at most, voidable. *Ibid.*

PROCURING SALE. See Intoxicating Liquors, 11, 12.

PROFIT. See Damages, 1, 2, 3, 4.

PROHIBITED TERRITORY. See Intoxicating Liquors, 1, 2, 3, 4.

PROOF. See Pleadings, 6; Damages, 9.

PROSPERITY. See Estates.

PROSPECTIVE DAMAGES. See Damages, 1, 2, 3, 4.

PROTECTION OF TRAINS. See Master and Servant, 2.

PROXIMATE CAUSE.

1. *Contributory Negligence—Safe Appliances.*—When the injury complained of was the failure of the railroad to furnish certain implements, called "lug hooks," for moving heavy timber, which plaintiff was employed to help move, it is proper for the trial Judge to instruct the jury that, if they should find, by the greater weight of the evidence, that for such service "lug hooks" were usually used by railroads for the work, it was the duty of the railroad to have furnished them; that if they further found, by the greater weight of the evidence, that the character of the work was such that a man of ordinary prudence would be led to see that their use were safer, the failure to provide them would be negligence, which, if the proximate cause, would render defendant liable. *Rushing v. R. R.*, 158.

2. *Railroads — Permissive Licensee — Contributory Negligence.* — The defendant railroad had piled scantling along its right-of-way, and plaintiff, a permissive licensee, was injured by the defendant's locomotive striking a scantling while backing, and throwing it upon him. *Held*, that the jury, by finding, under a proper instruction, that by the exercise of the care required of an ordinarily prudent man, under the circumstances, the plaintiff should have perceived the probability of the occurrence, necessarily found that plaintiff's negligence was the proximate cause of the injury. *Muse v. R. R.*, 443.

3. *Same—Concurrent Negligence.*—A railroad company does not owe the same degree of care in preventing an injury to a permissive licensee as it does to its passengers, or employees in the discharge of their duties; and if a railroad company and the permissive licensee on its right-of-way are both negligent, and the latter is injured, and his negligence is concurrent with that of the railroad and continues up to the moment of the impact, the law attributes the injury to his negligence and not to that of the defendant. *Ibid.*

PUBLIC DUTIES. See Telegraph Companies, 2.

PUBLIC INTEREST. See Interpretation of Statutes, 3, 4.

PUNISHMENT. See Constitutional Law, 16.

PURCHASE PRICE. See Mortgagor and Mortgagee, 4.

QUALIFICATION. See Jurors, 3.

QUALITY. See Warranty, 4.

QUESTIONS FOR COURT.

1. *Questions of Law—Findings of Jury—Harmless Error.*—Questions of law referred to the jury and properly found by them, do not constitute reversible error. *Cordell v. Telegraph Co.*, 402.
2. *Corporations — Dissolution — Statutes — Procedure.*—Upon the dissolution at the final hearing of an order restraining a manufacturing corporation from dissolving according to the provisions of Revisal, sec. 1195, in an action brought by a stockholder, when it appears that there are substantial issues involving the adjustment of corporate affairs arising from the pleadings, especially as to indebtednesses between the corporation and plaintiff and defendant, which will require decision by the Court, the proceedings referred to and contemplated by Revisal, sec. 1203, should be carried on and completed in the present action, and include such orders as to the disposition and sale of the plant as may be for the best interests of the assets and of the parties. *White v. Kincaid*, 416.

QUESTIONS FOR JURY.

1. *Instructions—Credibility of Witnesses.*—An instruction which deprives the jury of the right to pass upon the credibility of the witnesses is properly refused. *Hawk v. Lumber Co.*, 16.
2. *Mortgagor and Mortgagee — Executors and Administrators — Purchaser at His Own Sale—Estoppel of Devisee and Heir—Ratification.*—A. mortgaged land to B., who, upon A.'s death, qualified as his administrator. B. sold the land pursuant to the power contained in the mortgage and procured C. to buy it. C. executed a deed to B., who charged himself, in his final account, as administrator, with the amount of the bid made by C. B. devised to D., the heir of A., a portion of the land, who, during infancy and while under coverture, entered upon the land devised to her. Thereafter she brought this action, treating the sale under the mortgage as void and offered to redeem. *Held*, (1) That the sale was voidable at the election of the heir of A. (2) That taking possession of the land devised to D. did not, as a matter of law, make an election, estopping her from the enforcement of her legal or

QUESTIONS FOR JURY—*Continued.*

equitable rights. (3) Whether her conduct amounted to a ratification was, in the light of the evidence, a question for the jury. His Honor's instructions upon the issue approved. *Rich v. Morisey*, 37.

3. *Evidence.*—During the bargain and sale of a horse, the vendor was asked by the vendee if the horse was all right. The vendor said he was sound and all right; nothing the matter except a little distemper which he, being a young horse, would soon get rid of. Vendee replied, that from "what you say and from what I see of the horse, I will give you $115 for him." The vendor accepted, saying it was an insufficient price—he had too many horses—and if the vendee found him worth more, he was to pay $10 in addition. *Held*, evidence sufficient to take the case to the jury upon the question of express warranty. *Harris v. Cannady*, 81.

4. *Issues—Questions of Fact—Equity Jurisprudence—Facts Established.*—While issuable facts, as distinguished from those which are evidentiary, must ordinarily be found by a jury, when the equity jurisdiction of the Court has been invoked, the Court will not grant a new trial when it appears that all of the essential facts upon which the rights of the parties depend are established by the pleadings or have been found by the jury. *Rich v. Morisey*, 37.

5. *Deeds and Conveyances — Reformation — Evidence.* — In an action to correct or reform a written instrument, when there is more than a scintilla of evidence, it is for the jury, and not for the Court, to say whether the evidence is clear, cogent and convincing. *Cuthbertson v. Morgan*, 72.

6. *Mortgagor and Mortgagee—Illegal Consideration—Evidence.*—When the defense to an action for the possession of personal property, claimed under mortgage by a subsequent purchaser, is that the consideration for the mortgage was the suppression of a criminal prosecution, and there is some evidence tending to show that the withdrawal of the prosecution was an independent transaction, not influenced by the promise to give the note and mortgage, it is sufficient to go to the jury. *Henderson-Snyder Co. v. Polk*, 104.

7. *Instructions — Facts Assumed — Contentions.*—A "contention," under conflicting evidence, made during the trial of an action brought upon account, that an account had been rendered and kept a reasonable time without objection, cannot be made a basis of exception to the refusal of the Judge to charge accordingly. (1) It assumes the facts as to the absence of objection and the reasonableness of the time the account was kept; (2) It does not meet the requirements of a request for instructions. *Davis v. Stephenson*, 113.

QUESTIONS FOR JURY—*Continued.*

8. *Instructions — Account Stated — Acceptance.*—Upon conflicting evidence, in a suit brought upon an account, it was not error to plaintiff's prejudice for the Judge to charge the jury there would be no legal presumption that the account was presented and accepted by defendant, and should the jury find that it had been presented and accepted, it would devolve upon the defendant to pay it. *Ibid.*

9. *Evidence—Account Stated — Correctness — Habitual Drunkenness.*—Evidence that the one suing on an account stated was in the habit of drinking liquor excessively, is competent for the purpose of showing that he was not qualified to transact business or to keep accounts correctly. *Ibid.*

10. *Railroads—"Look and Listen"—Obstructed View—Contributory Negligence.*—While a person who had voluntarily gone on a railroad track, where the view was unobstructed, and failed to look and listen, cannot recover damages for an injury which would have been avoided by his having done so, when the view is obstructed or other existing facts tend to complicate the matter, the question of contributory negligence may become one for the jury. *Inman v. R. R.*, 123.

11. *Same—Evidence.*—Where there is evidence tending to show that a railroad company has several tracks in a city over which the plaintiff usually went in going to and from his work, and that the view of the track was obstructed, and plaintiff, standing within two paces of the track, having listened for warnings he had a right to expect, but which were not given, stepped upon the track and was injured by defendant's train running at a much greater speed than allowed by the town ordinance, and which was unsafe at the place indicated, the question of contributory negligence is properly submitted to the jury. *Ibid.*

12. *Deeds and Conveyances — Undue Influence — Evidence.*—Upon evidence tending to show that the grantor of a deed was not a provident or industrious man, that he was addicted to drink and was, at times, but not usually, incapable of attending properly to his business, and that usually he managed his own affairs, made contracts, executed deeds, etc., and that he was sober and clothed in his right mind at the time he executed the deed in question, the verdict of the jury that the deed in question was not obtained through undue influence will not be disturbed on appeal. *Myatt v. Myatt*, 137.

13. *Evidence—Nonsuit.*—In an action for damages alleged to have arisen from a wrongful death, if there is any evidence tending to show that the death was the result of defendant's neg-

QUESTIONS FOR JURY—*Continued.*

ligence, it should be submitted to the jury, and a motion as of nonsuit upon the evidence disallowed. *Thompson v. R. R.*, 155.

14. *Railroads—Negligence—Death by Wrongful Act—Evidence.*—In an action for damages claimed for a wrongful death owing to defendant's negligence, evidence should be submitted to the jury which tends to show, that on a dark night, about half an hour after plaintiff's intestate was seen at defendant's station, defendant's train came by at high speed, without headlights, and gave no warning or signals, at the proper places, which would indicate to plaintiff's intestate its approach; that, when last seen, plaintiff was drinking, and eating peanuts, and was found at daylight the next morning in a dying condition, with injuries indicating that he had been struck by defendant's train, and with indications on his clothes, and on the ground near him, that, at or shortly before the time he was injured, he was eating peanuts. *Ibid.*

15. *Negligence — Evidence Conflicting — Nonsuit.*—A motion as of nonsuit upon the evidence should be denied, in an action to recover damages alleged to have arisen from defendant's negligence, when the testimony tends to show that the injury was caused by an improper order of a vice principal, given to plaintiff in the course of his employment, and that the plaintiff was not negligent in doing the work. *Rushing v. R. R.*, 158.

16. *Negligence — Traction Engine—Highways—Nuisance—Reasonable Time.*—In a suit for damages occasioned by plaintiff's horse being frightened by a broken down traction engine left to one side of a public highway, it is for the jury to say, upon the question of negligence, whether the defendant delayed an unreasonable length of time in having it repaired and in taking it away. *Davis v. Thornburg*, 233.

17. *Deeds and Conveyances — Parol Evidence — Locating Calls.*—The description in a deed conveying a town lot as follows: "Beginning at a stake on W. street, said town, 27 feet 6 inches from N. W. corner of C. T. B. lot, on the same street, and runs N. 41, W. about 25½ feet to Sycamore street; thence with Sycamore street S. 48, W. 117½ feet; thence S. 41, E. about 25½ feet," etc., is adequate and sufficient, and where, in connection with such deed, there is testimony to the effect "that plaintiff had built his present brick store along Sycamore street and fronting Wall street, and the wall of such store above the ground was seven inches into Sycamore street, and this infringement on Sycamore street had been satisfactorily adjusted with the town authorities," this evidence

QUESTIONS FOR JURY—*Continued.*

furnished data from which the second corner called for in plaintiff's deed, to-wit: the intersection between Wall and Sycamore streets, could be given a physical placing, to-wit: at a point seven inches short of the wall of the brick store, and required that the question of the correct location of plaintiff's deed should be submitted to the jury. *Hanstein v. Ferrall*, 240.

18. *Evidence—Principal and Agent—Scope of Authority.*—Evidence is sufficient to go to the jury upon the authority of defendant's agent at S., a station on its road, to receive money for the purchase of a ticket from K., another station thereon, to S., to be delivered to plaintiff by the agent at K. which shows a receipt for the payment of the ticket at S., stating that it was from K. to S.; a telegram from the agent at S. to the one at K., directing that the ticket, as contended for, be furnished plaintiff; the agent at K. informed plaintiff that he could not furnish it until he had been so advised; the actual furnishing of the ticket as contended for, thereafter, on a regular form used by the defendant for such service. *Reeves v. R. R.*, 244.

19. *Insurance—Contracts—False Representations—Expressions of Opinion—Statements of Fact.*—Declarations, though clothed in the form of an opinion or estimate, made by a duly authorized agent to induce a contract or policy of insurance, accepted and reasonably relied upon by the other party as statements of facts, may be considered upon the question of whether fraud had been thereby perpetrated; and when there is a doubt as to whether they were intended and received as mere expressions of opinion, or statement of facts to be regarded as material, the question is one for the jury. *Whitehurst v. Ins. Co.*, 273.

20. *Wills — Estates — Betterments—Evidence.*—When there is evidence that defendant had been in possession of lands, asserting absolute ownership for more than thirty years, under a deed conveying to him a title in fee, executed by a devisee thereof and by a trustee named in the will, and had put permanent improvements thereon; that the land had been bought and paid for by defendant, and the deed taken under advice of counsel learned in the law, that the deed conveyed the true title; that the lower Court construed the will to convey the fee, but was overruled by the Supreme Court, holding that only a life estate was devised, and that the remainderman was entitled to the possession as the owner of the fee. *Held*, the evidence is relevant to the inquiry, and the claim for betterments should be submitted to the jury. (*Merritt v.*

QUESTIONS FOR JURY—*Continued.*

Scott, 81 N. C., 385, cited and distinguished). *Faison v. Kelly*, 282.

21. *Deeds and Conveyances—Boundaries—Evidence.*—In an action involving the title to lands, when the controversy is dependent upon the true location of lands described in a certain grant, the jury are not confined, necessarily, in their inquiry, to the location of the lines of other tracts called for in the grant, which are not themselves located. (*Moore v. McClain*, 141 N. C., 479, cited and approved). *McNeely v. Laxton*, 328.

22. *Deeds and Conveyances—Delivered to Third Party—Presumptive Delivery—Evidence—Burden of Proof—Verdict Directing.*—The presumption is that a deed duly proven was executed and delivered at the time it bears date. The burden of proof is upon the party seeking to attack its validity to show the contrary. Therefore, the Court erred in directing a verdict, but should have submitted the issue to the jury with appropriate instruction. *Fortune v. Hunt*, 358.

23. *Telegraph Companies—Address to Third Persons—Principal and Agent.*—The evidence showing a wrongful refusal by telegraph company's agent to receive, for transmission and delivery, a message addressed to a third person, requesting him to inform plaintiff's husband of the dangerous condition of his child and for him to come at once, and it appearing that the addressee could readily have given the information to plaintiff in time for him to reach home before the burial of his child, it is for the jury to find whether the addressee as agent of plaintiff would have communicated the information to the husband. *Cordell v. Telegraph Co.*, 402.

24. *Penalty Statutes—Railroads—Evidence.*—When a *prima facie* case is made out by the State against a railroad company for running its certain freight train on Sunday, in violation of Revisal, sec. 3844, and the company has introduced evidence tending to prove that it was done without its permission, it is error in the lower Court to charge the jury, if they should find from the evidence that the train in question belonged to the defendant, they should find the defendant guilty, unless its evidence satisfies them that the train was being run without its permission, as the question is exclusively one for the jury. *State v. R. R.*, 470.

25. *Instructions—Verdict Directing—Language Used—Evidence.*—When there is no conflict in the testimony, and, if believed, no inference permissible therefrom but that of guilt, it would not constitute reversible error for a trial Judge to charge the jury: "If they believe the evidence they would render a verdict of guilty"; though better form to charge, "If you find

QUESTIONS FOR JURY—*Continued.*

the facts to be as testified," etc.; but when there is conflict in the evidence on any essential feature of the charge, or when, though there is no such conflict, more than one inference of fact is permissible, and any of them consistent with the defendant's innocence, the question of guilt or innocence is one for the jury. *State v. R. R.*, 508.

26. *Evidence — Weight — Scintilla.*— When there is more than a scintilla of evidence as to the identity of a defendant, it is for the jury to pass upon its weight. *State v. Walker*, 527.

QUESTIONS OF LAW. See Questions for Court, 1.

RAILROADS.

1. *"Look and Listen"—Obstructed View—Contributory Negligence —Questions for Jury.*—While a person who had voluntarily gone on a railroad track, where the view was unobstructed, and failed to look and listen, cannot recover damages for an injury which would have been avoided by his having done so, when the view is obstructed or other existing facts tend to complicate the matter, the question of contributory negligence may become one for the jury. *Inman v. R. R.*, 123.

2. *Same—Evidence.*—Where there is evidence tending to show that a railroad company has several tracks in a city over which the plaintiff usually went in going to and from his work, and that the view of the track was obstructed, and plaintiff, standing within two paces of the track, having listened for warnings he had a right to expect, but which were not given, stepped upon the track and was injured by defendant's train running at a much greater speed than allowed by the town ordinance, and which was unsafe at the place indicated, the question of contributory negligence is properly submitted to the jury. *Ibid.*

3. *Ordinances Against Blowing Whistles — Warnings — Ringing Bells.*—When there is a town ordinance preventing the blowing of locomotive whistles within its limits, the bell should be rung continuously where there are numerous tracks, and the conditions and surroundings render the running of trains, continuously, dangerous to pedestrians. *Ibid.*

4. *Duty of Employer — Negligence — Evidence Sufficient.*— In an action for damages for personal injury, evidence of negligence is sufficient to take the case to the jury which tends to show, that, on a dark night, without the customary signal or warning, except the rumbling noise caused by its approach, an engine, which had been coupled to the train, but had gone for water, returning and making a coupling to the train, struck the train on a level track, with violence, the force be-

RAILROADS—*Continued.*

ing sufficient to drive the entire train of twenty-two cars back to the distance of from a car and a half to two car lengths, just as the plaintiff, in the discharge of his duties as employee, was getting into the cab of his engine coupled at the other end of the train, thereby throwing him in front of his engine onto the track ahead, and causing the injury complained of. *Meacham v. R. R.*, 147.

5. *Rule of Employer — Protection of Trains — Interpretation of Rules—Sidings.*—A rule of the employer, a railroad company, to the effect that a flagman is directed to go back a given distance to the rear of his train and place torpedoes in certain places, "when a train is stopped at an unusual point, or is delayed at a regular stop-over three minutes, or when it fails to make its schedule time," is for the protection of trains when they are on the main line at an unusual place, or for an unusual length of time, and for the purpose of preventing injury by reason of other trains coming from the rear, and has no application to trains on a siding at a regular station, in no apparent danger. *Ibid.*

6. *Same — Evidence — Nonsuit — Contributory Negligence.*— Evidence tending to show that defendant railroad company negligently caused plaintiff to be thrown to the ground, and inflicted the injury complained of, while his train was on a siding at a regular station without apparent danger from approaching trains, and that he was acting under the instruction of his superiors in charge, or with their knowledge and approval, is not affected by the fact that he was not acting under a rule made for the protection of trains when on the main line, so as to raise the question of contributory negligence; and a judgment of nonsuit upon the evidence based on this contention is properly refused. *Ibid.*

7. *Rules of Employer—Interpretation—Parol Evidence—Rule Inapplicable.*—Parol evidence tending to show that conditions had arisen in a particular instance so that a printed rule of employer did not apply, is not an interpretation of the rule by parol. *Ibid.*

8. *Duty to Employees—Trespassers.*—A railroad company does not owe the same duty to one who has surreptitiously climbed, in the night, upon the tender of its switching engine, being used around its extensive and dangerous railroad yards at its station, as it does to its employees; and no invitation to do such an act can be implied from such conditions and surroundings. *Bailey v. R. R.*, 169.

9. *Wanton Negligence—Evidence—Insufficient.*—Mere forgetfulness, whatever the consequence, does not constitute a wilful or wanton neglect of duty; for the words imply that the act

RAILROADS—*Continued.*

was knowingly and purposely done. Therefore, when the evidence does not disclose that leaving a switch open, which caused the injury, was knowingly done, or done in utter disregard of the consequences, it is not sufficient to sustain a verdict for damages found to be occasioned by "wanton negligence" on the part of the railroad company, or its employees. *Ibid.*

10. *Defenses—Fellow Servant Act.*—The defense that the injury complained of resulted from the negligent act of a fellow servant is still available, except in its application to a railroad company; for, by express terms, the statute known as the "Fellow Servant Act," by which this defense was withdrawn, is confined in its operation to railroad companies. *Wade v. Contracting Co.*, 177.

11. *Negligence—Lights—Signals—Crossings—Evidence—Nonsuit.*—Plaintiff's intestate was killed by defendant's train, consisting of an engine and twenty freight cars, backing along its track on a dark night, without signals or warnings, and without lights on the rear car from the engine. At the place of the injury was an embankment on which was a track of another company running parallel with that of defendant. The injury occurred while plaintiff, an employee, was going home from his work, and crossing the tracks at a place where, to defendant's knowledge, people usually crossed. The evidence tended to show that on top and about the middle of the train were two men standing with lighted lanterns. *Held*, a judgment as of nonsuit upon the evidence should not be sustained, as the question was for the jury to determine whether the lanterns could have been readily seen at the time, and under the circumstances, by an observant person on the ground. *Allen v. R. R.*, 258.

12. *Lessor and Lessee — Torts of Lessee — Liability of Lessor.*—While a lessor railroad company, having a charter from the State, remains liable for the manner in which its lessee railroad company performs the public duties arising from the use under its charter, it is not liable for the tortious acts of its lessee in carrying on an entirely separate and distinct, though similar, business of its own, and which does not fall within the duties of the lessor road to the public. *McCulloch v. R. R.*, 305.

13. *Pleadings—Lessor and Lessee—Cause of Action Stated—Jurisdiction — Removal of Causes — Federal Courts.*— When the complaint, in a joint suit against a domestic and foreign railroad corporation, alleges that the latter is a lessee of the former, and that its action in taking plaintiff's land for rail-

RAILROADS—*Continued.*

road purposes, the subject of the suit, was unjustifiable under the charter granted by the State to its lessor, but was for a separate and distinct part of the lessee's business, no cause of action is alleged as the lessor company, and the lessee, when the amount demanded is jurisdictional, can, upon proper proceedings, have the cause removed to the Federal courts. *Ibid.*

14. *Same.*—Allegations of the complaint that defendant railroad company, a domestic corporation, which had lawfully acquired the lands in question, had leased its road, and charter rights to operate it, to its co-defendant, a foreign corporation, and that, for its separate and distinct purposes, the latter had imposed an additional and unauthorized burden upon the *locus in quo*, states a cause of action against the latter company alone, and, upon proper proceedings, the cause is removable to the Federal court, when the amount is jurisdictional. *Ibid.*

15. *Pleadings — Jurisdiction — Severable Causes — Removal of Causes — Federal Courts — Amendments.*— When, in a suit brought jointly against a domestic and foreign corporation, in the State courts, the complaint alleges a severable cause of action, and an amendment is made to sufficiently increase the amount involved to confer jurisdiction on the Federal court, upon proper proceedings for removal had by the latter company, the cause is removed *eo instanti* by the force of the statute, and the State courts cannot proceed further, or inquire into the amount of damages plaintiff is legally entitled to recover under the facts stated, or to pass upon the validity of the cause, or permit the amended complaint to be withdrawn. *Ibid.*

16. *Jurisdiction—Removal of Causes—Federal Courts—Money Demand—Condemnation Proceedings.*—The jurisdiction of the Federal courts is not affected in a suit wherein the plaintiff claims damages from a foreign corporation, for an additional and alien burden upon his lands; for it is not a question of appropriating property against the owner's will, as in the enforcement of the right to acquire land by condemnation proceedings. *Ibid.*

17. *Rights of Way — Permissive User — Trespasser — Permissive Licensee.*—The fact that a railroad company has permitted the public to use a part of its right-of-way as a street does not affect its right to use such part in the conduct of its business, and place lumber or other merchandise thereon in so doing; a person entering thereon, not upon matters relating to the company's business, is a permissive licensee. *Muse v. R. R.*, 443.

RAILROADS—*Continued.*

18. *Permissive Licensee — Contributory Negligence — Proximate Cause.*—The defendant railroad had piled scantling along its right-of-way, and plaintiff, a permissive licensee, was injured by the defendant's locomotive striking a scantling while backing, and throwing it upon him. *Held*, that the jury, by finding, under a proper instruction, that by the exercise of the care required of an ordinarily prudent man, under the circumstances, the plaintiff should have perceived the probability of the occurrence, necessarily found that plaintiff's negligence was the proximate cause of the injury. *Ibid.*

19. *Same—Concurrent Negligence.*—A railroad company does not owe the same degree of care in preventing an injury to a permissive licensee as it does to its passengers, or employees in the discharge of their duties; and if a railroad company and the permissive licensee on its right-of-way are both negligent, and the latter is injured, and his negligence is concurrent with that of the railroad and continues up to the moment of the impact, the law attributes the injury to his negligence and not to that of the defendant. *Ibid.*

20. *Penalty Statutes—Sunday, Running of Freight Trains—Permission—Evidence.*—Upon a trial under an indictment against a railroad company for loading, running, etc., a freight on Sunday, in violation of the provisions of Revisal, 3844, the State must show, beyond a reasonable doubt, that the defendant had permitted the offense to be done; but when the State has shown the wrongful act, it is sufficient for the jury to find that it was done with defendant's permission. *State v. R. R.*, 470.

21. *Same—Reasonable Doubt—Burden of Proof.*—Upon trial for violating the provisions of Revisal, sec. 3844, it is error for the lower Court to charge the jury that the burden was upon defendant to show that a certain freight train was run without its permission, when there is conflicting evidence upon that question; for, in order to convict, they should find as a fact, beyond a reasonable doubt, that the defendant had permitted the running of the train in violation of the statute. *Ibid.*

22. *Penalty Statutes — Evidence — Questions for Jury.*— When a *prima facie* case is made out by the State against a railroad company for running its certain freight train on Sunday, in violation of Revisal, sec. 3844, and the company has introduced evidence tending to prove that it was done without its permission, it is error in the lower Court to charge the jury, if they should find from the evidence that the train in question belonged to the defendant, they should find the defendant

RAILROADS—*Continued.*

guilty, unless its evidence satisfies them that the train was being run without its permission, as the question is exclusively one for the jury. *Ibid.*

23. *Running Trains on Sunday—Indictment—Evidence—Variance—Verdict Directing.*—When the proof under a bill of indictment, sufficient in form, against a railroad company for running trains, in violation of the statute, tends to fix the offense as occurring in July, and the charge assigned the date as the January following, the time is not material, and the variance is not of the substance, and a prayer of defendant that a verdict of not guilty be thereupon directed should not be granted. *State v. R. R.*, 508.

24. *Running Trains on Sunday—Bill of Particulars—Discretion of Court, No Abuse of—Error and Appeal.*—The granting of an order for a bill of particulars to be furnished the defendant railroad company under indictment for running trains on Sunday, in violation of the statute, is in the discretion of the Court, Revisal, sec. 3244; and the question of sufficient compliance is likewise in the sound legal discretion of the trial Judge, and will not be reviewed or disturbed on appeal, unless there has been manifest abuse to defendant's prejudice. *Ibid.*

25. *Same.*—The object of a bill of particulars is to enable the defendant to properly prepare his defense in cases where the bill of indictment, though correct in form and sufficient to apprise the defendant in general terms of the accusation against him, is yet so indefinite in its statements as to the particular charge or occurrence referred to, that it does not afford defendant a fair opportunity to procure his witnesses or prepare his defense. When it appears that the trial Judge has, in his discretion, accepted a bill of particulars as being sufficient under an order theretofore granted at the instance of defendant, and that upon a former trial of the same cause the State's witnesses were examined and information so fully given as to render a further bill of particulars unnecessary, the discretion exercised by the trial Judge will not be reviewed on appeal. *Ibid.*

RATIFICATION. See Questions for Jury, 2; Procedure, 5; Bond Issues, 1.

REASONABLE DOUBT. See Instructions, 20; Evidence, 79.

REASONABLE TIME. See Negligence, 13.

REBATES. See Insurance, 6.

REBUTTAL. See Evidence, 64, 66.

RECORDER'S COURT. See Legislative Powers, 5.

RECORDING REPORT. See Partition, 4.

RECORDS, BURNT AND LOST. See Deeds and Conveyances, 36.

REFORMATIONS. See Deeds and Conveyances, 6.

REFUSAL TO RECEIVE. See Telegraph Companies, 3; Carriers of Goods, 6, 7, 8, 9.

REGISTRATION. See Mortgagor and Mortgagee, 1.

REGISTRATION OF DEED. See Principal and Agent, 1.

RELIEF IN ONE ACTION. See Procedure, 6.

RELIGIOUS MEETINGS.

Disturbance—Indictable Offense—Sunday-school.—A person who wilfully disturbs an assembled Sunday-school held in a place for the purpose, is indictable both at common law and under Revisal, secs. 3704 and 3706. *State v. Branner*, 560.

REMAINDERS. See Deeds and Conveyances, 14.

REMEDIES. See Constitutional Law, 8.

REMITTER. See Jurisdiction, 2.

REMOVAL OF CAUSES.

1. *Railroads — Pleadings — Lessor and Lessee — Cause of Action Stated—Jurisdiction—Federal Courts.*—When the complaint, in a joint suit against a domestic and foreign railroad corporation, alleges that the latter is a lessee of the former, and that its action in taking plaintiff's land for railroad purposes, the subject of the suit, was unjustifiable under the charter granted by the State to its lessor, but was for a separate and distinct part of the lessee's business, no cause of action is alleged as to the lessor company, and the lessce, when the amount demanded is jurisdictional, can, upon proper proceedings, have the cause removed to the Federal courts. *McCulloch v. R. R.*, 305.

2. *Same.*—Allegations of the complaint that defendant railroad company, a domestic corporation, which had lawfully acquired the lands in question, had leased its road, and charter rights to operate it, to its co-defendant, a foreign corporation, and that, for its separate and distinct purposes, the latter had imposed an additional and unauthorized burden upon the *locus in quo*, states a cause of action against the latter company alone, and, upon proper proceedings, the cause is removable to the Federal court, when the amount is jurisdictional. *Ibid.*

REMOVAL OF CAUSES—*Continued.*

3. *Railroads — Pleadings — Jurisdiction—Severable Causes—Federal Courts—Amendments.*—When, in a suit brought jointly against a domestic and foreign corporation, in the State courts, the complaint alleges a severable cause of action, and an amendment is made to sufficiently increase the amount involved to confer jurisdiction on the Federal court, upon proper proceedings for removal had by the latter company, the cause is removed *eo instanti* by the force of the statute, and the State courts cannot proceed further, or inquire into the amount of damages plaintiff is legally entitled to recover under the facts stated, or to pass upon the validity of the cause, or permit the amended complaint to be withdrawn. *Ibid.*

4. *Railroads — Jurisdiction — Federal Courts—Money Demand — Condemnation Proceedings.*—The jurisdiction of the Federal courts is not affected in a suit wherein the plaintiff claims damages from a foreign corporation, for an additional and alien burden upon his lands; for it is not a question of appropriating property against the owner's will, as in the enforcement of the right to acquire land by condemnation proceedings. *Ibid.*

REPORT. See Partition, 4.

REPRESENTATION. See Constitutional Law, 4.

REQUISITES. See Executions, 1; Pardons, 3, 4.

RES GESTAE. See Evidence, 43.

RESPONDEAT SUPERIOR. See Master and Servant, 8.

RETRACTION. See Power of Court, 11.

REVISAL.

Reference should be made to the various subject-matters for accuracy:

SECTION.

59. Action given to executors and administrators for death caused by wrongful act of another is not available to foreign executors, etc., qualifying here after the time specified. *Hall v. R. R.*, 108.

328. Copies of burnt or lost records put in evidence in proceedings to restore them have only the force and effect of the originals, and does not estop a party from proving title to lands, or showing true boundaries. *McNeely v. Laxton*, 327.

405. Rule of Supreme Court applies to appointment of next friend in Justice's court. *Houser v. Bonsal*, 51.

REVISAL—*Continued.*

SECTION

477. A demurrer for misjoinder of separate actions is not good when the complaint alleges a joint demand. The defense should be by answer. Same when proceedings are in Justice's court. *Laney v. Hutton*, 264.

607. Dismissing appeal from Justice's court has the effect of affirming the judgment. *McClintock v. Ins. Co.*, 35.

608. Dismissing appeal from Justice's court has the effect of affirming the judgment. *McClintock v. Ins. Co.*, 35.

610. Appeal from Clerk in proceedings in partition to sell lands. *Little v. Duncan*, 84.

611. Appeal from Clerk in proceedings in partition to sell lands. *Little v. Duncan*, 84.

612. Duty of the Clerk in proceedings in partition of lands to prepare and state case upon issues formed and transmit it to the Judge. *Little v. Duncan*, 84.

619. Issuance of an execution upon a judgment after three years without notice an irregularity. *McKeithen v. Blue*, 95.

620. Waiver of irregularity of execution issued after three years upon a judgment without notice. *McKeithen v. Blue*, 95.

717. Duty of Clerk to transfer cause to civil issue docket for trial in term upon issues joined in proceedings in partition to sell lands. *Little v. Duncan*, 84.

946. Deed to husband and wife, and to heirs of the latter, does not pass the fee to the former. *Sprinkle v. Spainhour*, 223.

946. Premises of deed to A. and heirs; habendum, the lands to be divided among children of A., creates no repugnance as the same estate would have passed had the word "heirs" been omitted. *Triplett v. Williams*, 394.

1195. The courts will not interfere with the discretionary powers of directors in winding up the affairs of a corporation when honestly exercised; and when a restraining order against them is dissolved, and substantial issues raised involving the adjustment of the corporation's indebtedness, they may be adjusted in the same action according to the proceedings contemplated in sec. 1203. *White v. Kincaid*, 415.

1203. The proceedings contemplated in this section may be carried out in a suit brought to restrain the discretionary powers of directors under sec. 1195, when therein substantial issues are raised relative to the adjustment of the corporation indebtedness, and the order has been dissolved. *White v. Kincaid*, 415.

1473. Rule of Supreme Court applies to appointment of next friend in Justice's court. *Houser v. Bonsal*, 51.

1541. Rule of Supreme Court applies to appointment of next friend in Justice's court. *Houser v. Bonsal*, 51.

REVISAL—*Continued.*

SECTION.

1563. It is not necessary for the complaint to allege knowledge of the grounds of divorce at least six months prior to its filing. The affidavit confers jurisdiction. *Kinney v. Kinney*, 321.

1564. The defense of the wife of abandonment in an action for divorce brought by the husband should be taken by answer. *Kinney v. Kinney*, 321.

1583. An estate to D. for life, then to heirs of S., who was then alive, the word "heirs" construed as children. *Condor v. Secrest*, 201.

1634. For purposes of contradiction the State may cross-examine defendant, who has taken the stand, when no evidence of his character has been given; without restriction to matters on direct examination. *State v. Cloninger*, 567.

1684. When a county has adopted the stock law the commissioners may declare a mountain range, a fence, or other natural line, as the limit within which the law shall operate. *State v. Mathis*, 546.

1957. The revision of the jury list is directory; and failure of the county commissioners to do so, in the absence of bad faith or corruption, does not vitiate the venire. *State v. Banner*, 519.

1960. The revision of the jury list is directory; and failure of the county commissioners to do so, in the absence of bad faith or corruption, does not vitiate the venire. *State v. Banner*, 519.

2121. The action of a school board not supervised or restrained by the courts. *Pickler v. Board of Education*, 221.

2631. The question of interstate commerce does not arise upon refusal of carrier to accept goods for shipment to foreign points. *Reid v. R. R.*, 423.

2631. The refusal of carrier's agent to accept goods for that he did not know the place of destination, does not relieve the carrier from liability for penalty when he should reasonably have ascertained the information. *Reid v. R. R.*, 423.

2632. The carrier's *prima facie* liability for penalty for failure to deliver goods is rebutted by shipper's admission of shipper's load and count without requiring the carrier to verify. *Peele v. R. R.*, 390.

2634. Parol evidence is admissible to show that claim was filed with the carrier for penalty. Right to recover penalty is not affected by compromise. *Rabon v. R. R.*, 59.

2977. The limitation upon cities to create a bonded indebtedness is statutory and not constitutional. *Wharton v. Greensboro*, 62.

3073. The penalty for failure to have weights and measures listed is only imposed on those who buy or sell by them. *Nance v. R. R.*, 366.

REVISAL—*Continued.*

SECTION.

3244. The granting of an order for a bill of particulars is in the discretion of the trial Judge. *State v. R. R.*, 508.

3255. Carnal intercourse with daughter of half sister is incest. *State v. Harris*, 513.

3276. No appeal lies by the State from the action of the trial Judge in striking out a plea of guilty and substituting one of not guilty. *State v. Branner*, 559.

3338. Evidence in this case held sufficient to sustain a verdict of guilty of burning a barn under this section. *State v. Allen*, 458.

3366. A Justice's court has final jurisdiction of wilful abandonment of crops, and judgment under indictment originating in Superior Court will be arrested. *State v. Wilkes*, 453.

3534. This section cannot apply when the sale of intoxicating liquor is not illegal, or when in conflict with the commerce clause of the Federal Constitution. *State v. Whisenant*, 515.

3534. An agent of the buyer in ordering whiskey from beyond the State, without interest in the whiskey or sale, is not indictable under this section. *State v. Whisenant*, 515.

3534. One who procures liquor by purchase from an illicit distiller in prohibited territory and delivers it to another, is subject to the punishment prescribed in this section; and his evidence that he was acting solely for the buyer cannot change the result. *State v. Burchfield*, 537.

3704. The wilful disturbance of a Sunday-school is an indictable offense. *State v. Branner*, 560.

3706. The wilful disturbance of a Sunday-school is an indictable offense. *State v. Branner*, 559.

3769. A board fence with barbed wire on top, comes under the provisions of this section. *State v. Thomas*, 565.

3844. While the State must show a carrier permitted its freight train to run on Sunday in violation of the statute, the wrongful act shown is sufficient to take the case to the jury upon that question. *State v. R. R.*, 470.

3844. The State must show that the carrier permitted a freight train to run on Sunday in violation of the statute; and the question, upon conflicting evidence, is one for the jury. *State v. R. R.*, 470.

4116. The action of a school board not supervised or restrained by the courts. *Pickler v. Board of Education*, 221.

4124. The action of a school board not supervised or restrained by the courts. *Pickler v. Board of Education*, 221.

4129. The rebuilding by a school board of a schoolhouse on an old site within three miles from another, is not a violation of the statute. *Pickler v. Board of Education*, 221.

REVISAL—*Continued.*

SECTION.

4775. Special benefits given to some policy holders, and not to all of the same class and expectation of life, do not necessarily avoid the payment of a note given for the premium. *Annuity Co. v. Costner*, 293.

REVOCATION. See Deeds and Conveyances, 43.

RIGHT OF SURVIVORSHIP. See Husband and Wife, 6.

RIGHTS OF WAY. See Railroads, 17.

RIGHTS, PRIVATE. See Interpretations of Statutes, 3, 4.

ROADS AND HIGHWAYS.

Negligence — Traction Engine — Nuisance — Reasonable Time — Questions for Jury.—In a suit for damages occasioned by plaintiff's horse being freightened by a broken down traction engine left to one side of a public highway, it is for the jury to say, upon the question of negligence, whether the defendant delayed an unrêasonable length of time in having it repaired and in taking it away. *Davis v. Thornburg*, 233.

RULES OF EMPLOYER. See Master and Servant, 2.

SAFE APPLIANCES. See Contributory Negligence, 3; Master and Servant, 11, 12, 13.

SALES. See Evidence, 7; Intoxicating Liquors, 5, 7, 10, 11, 12; Husband and Wife, 6; Mortgagor and Mortgagee, 2, 4, 7; Notice, 2; Wills, 4.

SALE; VOIDABLE. See Mortgagor and Mortgagee, 3, 4; Intoxicating Liquors, 1, 2, 3, 4.

SCHOOL BOARDS. See Municipal Corporations, 9.

SCHOOL COMMITTEE.

1. *Change of Location of School—Discretion.*—The question of changing the location of a schoolhouse is one vested by statute in the sound discretion of the school committee, and their action therein cannot be restrained by the Courts, unless in violation of some provision of law, or the committee is influenced by improper motives, or there is misconduct on their part. *Venable v. School Committee*, 120.
2. *Same—Evidence.*—An order restraining the action of a school committee in accepting a proposition for a change of site of a schoolhouse in a town, should be dissolved when it is shown to be in accordance with the wishes of a majority of its patrons, and to the best interests of the school. No improper

SCHOOL COMMITTEE—*Continued.*

motive or misconduct is evidenced by members of the committee subscribing to the purchase price of the new location, reasonably valued at $400, in exchange for which the old site, reasonably valued at $300, was to be given, as such would, in effect, be a donation of $100 for the purpose of effecting the desired change; or by the fact that a brother of a member of the committee was a part owner of the new site. *Ibid.*

SCHOOL DISTRICTS. See Municipal Corporations, 9, 10.

SCHOOLHOUSE. See Municipal Corporations, 10.

SCINTILLA. See Evidence, 90.

SCOPE OF AUTHORITY. See Principal and Agent, 4.

SECOND OFFENSE. See Indictment, 2.

SECRET ASSAULT. See Assaults, 1.

SELF-DEFENSE. See Evidence, 96, 97, 102.

SENTENCE, TERM OF. See Larceny, 3.

SERVICE. See Process, 2, 3.

SETTLEMENT. See Penalty Statutes, 2.

SEVERABLE CAUSES. See Removal of Cause, 3.

SEVERABLE CONTRACTS. See Contracts, 17, 18.

SHADE TREES. See Condemnation Proceedings, 1, 2.

SHIPPER'S LOAD AND COUNT. See Carriers of Goods, 4.

SIDINGS. See Master and Servant, 2.

SICKNESS. See Evidence, 68.

SIGNALS. See Negligence, 15.

SIGNATURE. See Telegraph Companies, 5.

SLANDER.

1. *Procedure—Misjoinder of Defendants.*—A joint action may be maintained against two or more persons for slanderous words spoken, unless the defendants are connected by allegation and proof of a common design and purpose. *Rice v. McAdams*, 29.
2. *Pleadings—Amendments—Conspiracy Alleged—Theory of Trial—Instructions.*—When, owing to an amendment of pleadings, the trial of slander against two defendants joined in the same suit is necessarily upon the theory of conspiracy, and no

SLANDER—*Continued.*

other, and the issues are not so framed, it is the duty of the trial Judge to try the case upon the amended pleadings, and it is not error for him to so instruct the jury under the issues that they may not be misled by their form. *Ibid.*

3. *Husband and Wife—Indictment of Husband.*—Held by Clark, C. J., and Walker and Connor, JJ.: A husband is indictable, under Revisal, sec. 3640, if he wantonly and maliciously slander his wife. (*State v. Edens*, 85 N. C., 522, is overruled). *State v. Fulton*, 485.

4. *Same.*—Held by Walker, J., that by reason of the decision in *State v. Edens, supra*, the bill against defendant herein was properly quashed, though offenders will be punishable. (Following *State v. Bell*, 136 N. C., 674). *Ibid.*

5. *Same.*— Held by Brown and Hoke, JJ., the bill herein was properly quashed, because a husband who slanders his wife is not indictable under Revisal, sec. 3640, as heretofore held in *State v. Edens*. *Ibid.*

6. *Same.*—The judgment of the Superior Court quashing the bill is affirmed. *Ibid.*

SOLICITOR'S DISCRETION. See Indictment, 7.

SPECIFIC ACTS. See Marriage and Divorce, 4, 5.

SPIRIT AND MISCHIEF. See Interpretation of Statutes, 8.

SPIRITUOUS LIQUORS. See Intoxicating Liquors.

STATEMENT. See Partnerships, 1.

STATEMENT OF FACTS. See Insurance, 1.

STATE'S APPEAL. See Appeal and Error, 18.

STATIONS, REGULAR. See Penalty Statutes, 5.

STATUTES, INTERPRETATION OF. See Interpretation of Statutes.

STATUTE OF FRAUDS.

Pleadings.—When the statute of frauds is relied upon in defense, it must be pleaded, to be available. *Teal v. Templeton*, 32.

STOCKHOLDERS, RIGHT OF. See Corporations, 2, 5.

STOCK LAW.

1. *County Commissioners—Territory—Boundaries.*—In pursuance of an election held under Revisal, sec. 1684, resulting in favor of the stock law, it is competent for the county commissioners to forbid stock from running at large within the county, and

STOCK LAW—*Continued.*

declare a mountain range, a creek, a fence, or other natural line, as the limit within which the law shall operate. *State v. Mathis*, 546.

2. *Same—Fence—Adjoining County.*—When the stock law is in force in a county, under the provisions of Revisal, sec. 1684, and the defendant, prosecuted for its violation, lives within a short distance from the dividing line of that and adjoining county wherein the stock law was not operated, and wilfully permits his stock to run at large, it is not a valid defense that no fence had been built on the line to prevent the stock from the adjoining county to run at large on his side of the line, when the county commissioners had declared the line to be a mountain range or other natural or political line. *Ibid.*

STREAM DIVERTING. See Water and Water Courses, 1.

STREETS. See Municipal Corporations, 11.

SUBSTANTIAL EVIDENCE. See Evidence, 106.

SUITS.

Forma Pauperis—Application Denied, Afterwards Granted.—An exception to the refusal of the trial Judge to dismiss an action, brought in *forma pauperis*, for that theretofore another action for the same cause had been dismissed by another Judge, under Revisal, 451, and no appeal taken, cannot be sustained. *Rich v. Morisey*, 37.

SUMMARY EFFECT. See *Habeas Corpus*, 1.

SUMMONS. See Justice of the Peace, 10, 11.

SUNDAYS. See Railroads, 20, 21, 22, 23, 24, 25.

SUNDAY-SCHOOL. See Religious Meetings.

SURPLUSAGE. See Indictment, 2.

SURROUNDINGS. See Evidence, 28.

SURVIVORSHIP, RIGHT OF. See Husband and Wife, 3.

TAXATION.

1. *Limitation Imposed On—Legislative Power—Constitutional Law.*—The limitation imposed upon cities in creating a bonded indebtedness is by statute, Revisal, sec. 2977, and not a constitutional one. *Wharton v. Greensboro*, 62.

2. *Same—Ratification.*—The Legislature, having the power to impose a general limitation upon the taxing power of municipalities, may ratify a bond issue previously declared invalid

TAXATION—*Continued.*

by the Courts on that account, and except any particular municipality from the operation of the general law. *Ibid.*

3. *Municipal Corporations—Constitutional Law—Representation.* —An objection to the validity of an act adding territory to that of a town, for that it restricted the right to vote on the subject of municipal taxation to the voters within the annexed territory, is without merit, when it appears from a construction of the act as a whole that a contrary intention is declared. *Lutterloh v. Fayetteville*, 65.

TAXES, PAYMENT OF. See Jurors, 3.

TELEGRAPH COMPANIES.

1. *Parties—Notice—Issues Insufficient—Judgment—Relationship.* —In a suit against a telegraph company by the wife for damages in negligently transmitting and delivering a message announcing a death, sent to the husband, upon the face of which she does not appear as a party in interest, it is necessary to a judgment for her that an issue be submitted to, and found in her favor by, the jury, as to whether she is beneficially interested therein; and a finding that the relationship between the deceased and plaintiff was that of sister, is not sufficient, as it shows no causal connection between the injury and the negligence complained of. *Holler v. Telegraph Co.*, 336.

2. *Duty to Public — Message Tendered.* — A telegraph company owes a duty to the public, within the scope of its business, to receive for transmission and delivery, under its reasonable rules and regulations, a proper message tendered with lawful charges for such service. *Cordell v. Telegraph Co.*, 402.

3. *Same—Refusal to Receive—Tort.*—For the wrongful refusal by a telegraph company to receive, for transmission and delivery, a message tendered, an action in tort accrues to the party injured. *Ibid.*

4. *Message Tendered and Refused—Torts—Measure of Damages.* —In an action arising in tort against a telegraph company for the wrongful refusal to receive a message for transmission and delivery, the damages recoverable are all such as proximately flow therefrom, and are not limited to those within the contemplation of the parties. *Ibid.*

5. *Message Tendered and Refused—Lawful Messages—Destination — Signature — Implied Knowledge.*—After having been sent back some twelve miles in the country by the defendant telegraph company's agent to have a message, formerly tendered and refused, written on defendant's blank used for the purpose, the agent of the sender tendered, with charges for

TELEGRAPH COMPANIES—*Continued.*

transmission and delivery, two messages written thereon, addressed to D., to tell C. (her husband) of the dangerous condition of his child, and to come at once. The defendant's agent had refused the first message, giving as his reason he did not know its destination, and had been informed that it was in the country some miles from its two telegraph offices, S. and B. The full charges for transmission and special delivery were tendered, and defendant's agent roughly refused to receive them because the place of destination of each were signed to the message, the sender's signature being omitted, instead of at its usual placing on the forms furnished. *Held,* (1) The messages were lawful ones; (2) They were sufficient to apprise the defendant's agent that they were for transmission to S. and B.; (3) The absence of the signature of the sender gave no indication of an unlawful design or purpose; (4) They gave notice that the failure to send them would cause mental anguish. *Ibid.*

6. *Address to Third Persons—Principal and Agent—Questions for Jury.*—The evidence showing a wrongful refusal by telegraph company's agent to receive, for transmission and delivery, a message addressed to a third person, requesting him to inform plaintiff's husband of the dangerous condition of his child and for him to come at once, and it appearing that the addressee could readily have given the information to plaintiff in time for him to reach home before the burial of his child, it is for the jury to find whether the addressee as agent of plaintiff would have communicated the information to the husband. *Ibid.*

7. *Time of Burial—Evidence.*—Evidence of the time of burial of the person concerning whose illness a telegram has been offered to defendant to send, may be competent in an action for mental anguish arising from the wrongful refusal of defendant to receive it for transmission. *Ibid.*

8. *Sickness in Plaintiff's Family—Evidence Immaterial.*—In an action upon tort for the wrongful refusal of a telegraph company to receive a message for transmission, announcing an illness of a child, evidence of the number of, or the sickness in, plaintiff's family, is immaterial, and is not reversible error. *Ibid.*

9. *Questions of Law—Findings of Jury—Harmless Error.*—Questions of law referred to the jury and properly found by them, do not constitute reversible error. *Ibid.*

VERDICT DIRECTING. See Verdict, 7.

VESTED RIGHTS. See Constitutional Law, 6.

VICE-PRINCIPAL. See Master and Servant, 8, 14.

VOIDABLE JUDGMENTS. See Judgments, 7.

VOTE OF THE PEOPLE. See Constitutional Law, 5.

TENANT BY THE COURTESY. See Husband and Wife, 5.

TENANT FOR LIFE. See Estates, 5, 6.

TERRITORY ANNEXED. See Municipal Corporations, 11.

THREATS. See Evidence, 81.

TICKET AGENT. See Principal and Agent, 4.

TIMBER DEEDS. See Evidence, 3; Contracts, 10.

TITLE. See Evidence, 1; Color of Title, 1, 2, 3, 4; Penalty Statutes, 3; Trusts and Trustees, 1.

1. *Deceased Persons, Transactions With—Title Claimed—Declarations.*—When deceased has had no interest in the lands in dispute, but was simply an assignee of a purchaser thereof and made a deed in accordance with directions given, evidence of his declarations and directions respecting the manner in which the deed was to have been drawn does not come within the prohibition of Revisal, sec. 1631, involving transactions and communications with deceased persons, as no claim of title is made under him. *Condor v. Secrest*, 201.

2. *Deeds and Conveyances—Adverse Possession—Instructions.*—When plaintiff claims the land by adverse possession, and the defendant claims as grantee of a purchaser at a sale under a mortgage given by plaintiff, which claim plaintiff resists upon the ground that the description in the mortgage does not cover the *locus in quo*, it is not to plaintiff's prejudice for the trial Judge to charge, in effect, that, if the plaintiff was in possession of the land for twenty years and held it openly and adversely within known and visible lines and boundaries, and had never conveyed the same, it would ripen the title in him. *Grimes v. Bryan*, 248.

3. *Contracts to Convey Lands — Equity — Parties — Imperfect.*—Specific performance of a contract to convey an indefeasible title to lands will not be enforced in equity against a purchaser, at the suit of one having the life estate, when those in remainder have not been made parties and would not be bound by the decree. *Triplett v. Williams*, 394.

TORT. See Telegraph Companies, 3, 4.

TORTS OF LESSEE. See Lessor and Lessee, 1.

TRANSACTIONS WITH DECEASED. See Harmless Error, 1; Deeds and Conveyances, 15.

TREATY. See Equity, 7; Evidence, 72.

TRESPASSERS. See Railroads, 8.

TRIAL BY JURY.

Appeal—Jurisdiction.—When a legislative act creates a court of original jurisdiction for the trial of petty misdemeanors, and prescribes an appeal to the Superior Court, the constitutional right of trial by jury is preserved. *State v. Shine*, 480.

TRUSTS AND TRUSTEES.

1. *Executors and Administrators—Guardian and Ward—Commissions—Power of Courts.*—A testator in his will bequeathed certain property to his infant daughter, and should she die leaving no child or children, then to his sister. Persons named were appointed executors and trustees "to carry out and perform the trusts therein declared." By a codicil to the will a guardian for the infant daughter was appointed, and the terms of the will ratified and confirmed in all other respects. *Held*, (1) The appointment of a guardian in the codicil was not inconsistent with the appointment of the trustees by the will to hold and control the property; (2) It is not necessary that title to the property be given in express terms, and the trustees, in this instance, are to take over, as trustees, the property from themselves, as executors, and hold and invest the same according to the terms of the will and for the period of time accordingly required; (3) It being conceded that the full income is for the infant daughter, it is to be paid to her guardian during her minority, and, thereafter, to her; (4) The guardian and executors should not receive full commission on account of monies disbursed between them, and the Court should make further and appropriate orders, after due notice, in relation thereto. *Haywood v. Trust Co.*, 208.

2. *Wills—Deeds and Conveyances—Descriptive Words—Estate.*—A devise to N. of all the residue of testator's estate in trust to receive, hold, invest and reinvest, evidences the purpose of the testator to embrace therein both real and personal property. (*Foil v. Newsome*, 138 N. C., 115, cited and approved). *Powell v. Wood*, 235.

3. *Wills—Executor and Administrator—Deeds and Conveyances—Power to Convey Implied.*—When a power is given a trustee under a will to receive, hold and invest and reinvest, the estate of his testator, including lands, which is consistent with the other terms of the will, it confers the authority to sell the lands and make valid title thereto. *Ibid.*

UNDUE INFLUENCE. See Deeds and Conveyances, 7, 8, 9, 10.

USER. See Water and Water Courses, 1.

USER, PERMISSIVE. See Railroads, 17.

USES AND TRUSTS. See Trusts and Trustees, 1.

Partition of Lands — Owelty Paid by Husband — No Resulting Trust.—Owelty money paid by a husband to equalize the partition of lands descended to his wife, among other heirs at law, as tenant in common, does not create a resulting trust in his favor to that extent, for, nothing else appearing, the law presumes he intended it for a benefit or as a gift. *Sprinkle v. Spainhour*, 223.

VARIANCE. See Pleas, 3.

VENDOR AND VENDEE.

1. *Contract—Breach by Vendee—Vendor in Possession—Vendor's Sale in Good Faith—Measure of Damages.*—On breach of contract by vendee in a sale of a stock of merchandise, the vendor, remaining in possession, may resell the goods with utmost good faith and with diligence as agent of the vendee, and recover, as damages, storage and interest on the purchase price, together with the difference between the price at which it was thus sold and that agreed upon in the contract. The question whether the resale was at a fair price is for the jury. (*Heiser v. Meares*, 120 N. C., 443, cited and distinguished). *Clothing Co. v. Stadiem*, 6.

2. *Warranty, What Constitutes.*—To hold a bargainor in a sale responsible for a warranty, it need not be made in express terms; for it is sufficient if the seller makes an affirmation of a material fact at the time of the sale, as an inducement, and it is accepted and reasonably relied on by the buyer. *Harris v. Cannady*, 81.

3. *Same—Evidence—Questions for Jury.*—During the bargain and sale of a horse, the vendor was asked by the vendee if the horse was all right. The vendor said he was sound and all right; nothing the matter except a little distemper which he, being a young horse, would soon get rid of. Vendee replied, that from "what you say and from what I see of the horse, I will give you $115 for him." The vendor accepted, saying it was an insufficient price—he had too many horses—and if the vendee found him worth more, he was to pay $10 in addition. *Held*, evidence sufficient to take the case to the jury upon the question of express warranty. *Ibid.*

VERDICT.

1. *Damages — The Word "Dollars" Omitted — Judgment.*—When the jury, in response to an issue on damages, had answered the issue "five thousand," it was not error in the trial Judge to add the word "dollars" in rendering judgment, when the pleadings, the evidence, the nature of the case and contention of the parties conclusively so indicated; and an exception taken thereto after the jury has been discharged cannot be upheld. *Cox v. R. R.*, 86.
2. *Same—Unit of Currency.*—When, to an issue in a suit for a demand for damages, the jury has answered in an amount, leaving off the word "dollars," the Judge may, in the judgment rendered, supply the word, for the dollar is the unit of our currency, in which the judgment is to be paid, and all other coins are recognized as multiples or fractional parts thereof. *Ibid.*
3. *Appeal and Error — Instructions — Verdict Directing—Exceptions—Broadside Exceptions.*—A general exception to an instruction for the jury to find for the plaintiff upon the whole evidence is not too indefinite, or defective as a broadside exception. *Woodbridge v. Brown*, 299.
4. *Issues Insufficient—Judgment.*—It is error for the trial Judge to render a judgment upon a verdict on issues submitted by him, and so framed as not to support it. *Holler v. Telegraph Co.*, 336.
5. *Deeds and Conveyances—Delivered to Third Party—Presumptive Delivery—Evidence—Burden of Proof—Verdict Directing—Questions for Jury.*—The presumption is that a deed duly proven was executed and delivered at the time it bears date. The burden of proof is upon the party seeking to attack its validity to show the contrary. Therefore, the Court erred in directing a verdict, but should have submitted the issue to the jury with appropriate instruction. *Fortune v. Hunt*, 358.
6. *Negligence—Contributory Negligence—Instructions—Facts Established by.*—When the question of defendant's negligence is dependent upon whether the engineer stopped the train in an unusually rough or jolting manner, and the Court charges the jury to find the appropriate issue for defendant if the engineer stopped it in the usual or ordinary manner, a verdict in plaintiff's favor establishes the defendant's negligence; and, further, when the Court charges the jury to answer likewise in defendant's favor if the plaintiff did not take all ordinary precautions to protect himself against all shocks or jolts, a verdict in plaintiff's favor clears him of contributory negligence. *Bull v. R. R.*, 427.

VERDICT—*Continued.*

7. *Instructions—Verdict Directing—Language Used—Evidence—Questions for Jury.*—When there is no conflict in the testimony, and, if believed, no inference permissible therefrom but that of guilt, it would not constitute reversible error for a trial Judge to charge the jury: "If they believe the evidence they would render a verdict of guilty"; though better form to charge, "If you find the facts to be as testified," etc.; but when there is conflict in the evidence on any essential feature of the charge, or when, though there is no such conflict, more than one inference of fact is permissible, and any of them consistent with the defendant's innocence, the question of guilt or innocence is one for the jury. *State v. R. R.*, 508.

8. *Intoxicating Liquors—Unlawful Sale—Interpretation—Acquittal—Entry of Different Verdict.*—Upon a trial under indictment for selling intoxicating cider and spirituous liquors, there was conflicting evidence as to the former, but the only evidence as to the latter was that defendant ordered one gallon of whiskey from K., beyond the State, for R., at the time he was ordering some for himself, without any interest in the sale as vendor, or vendor's agent or employee, but entirely as agent of the buyer. Without objection, the jury rendered a verdict to the Clerk, "Not guilty as to retailing cider or liquor, but guilty as to ordering one gallon of liquor for R." After the jury was discharged, the Court entered verdict of guilty: "Not guilty of selling liquor, other than the gallon ordered and delivered to R., as testified to by W." *Held*, (1) The sale at K. was not illegal, and not indictable; (2) It was error in the trial Judge to enter a verdict different from the one returned by the jury; (3) By reasonable intendment, the verdict of the jury was one of acquittal, excepting the order sent to K., beyond the State, and defendant should be discharged. *State v. Whisenant*, 515.

WAIVER.

1. *Evidence—Motions—Nonsuit.*—A motion as of nonsuit upon the evidence, made at the close of plaintiff's evidence and not renewed at the close of all the evidence, is waived. *Teal v. Templeton*, 32.

2. *Execution — Issuance — Irregularity.*— Where a judgment defendant appeared before the Superior Court in homestead appraisement proceedings and moved to set the same aside on the ground that he had not been notified of the time or place of appraisement, without asserting that the execution was defective, he waived the irregularity that it was issued without notice to him, as required by Revisal 1905, sec. 620. *McKeithen v. Blue*, 95.

WAIVER—*Continued.*

3. *Justice's Court—Summons—Service on Non-Resident of County —Appearance.*—By entering a general appearance and demurring, a non-resident defendant of the county waives or cures the defect, in proceedings against him in a Justice's court, for want of service of summons ten days preceding the trial, as prescribed by Revisal, sec. 1451. *Laney v. Hutton*, 264.

WARNINGS. See Railroads, 3.

WARRANTY.

1. *Vendor and Vendee—What Constitutes.*—To hold a bargainor in a sale responsible for a warranty, it need not be made in express terms; for it is sufficient if the seller makes an affirmation of a material fact at the time of the sale, as an inducement, and it is accepted and reasonably relied on by the buyer. *Harris v. Cannady*, 81.
2. *Pleadings — Contract — Counterclaim — Allegations.*—Evidence tending to show a breach of warranty in a contract for the sale of goods is incompetent when the warranty was not specially pleaded. *Woodbridge v. Brown*, 299.
3. *Contracts—Evidence.*—The mere facts that the seller of merchandise knew the purpose for which it was purchased, and, at the time, said that the grade would do, and used for the purpose intended, does not constitute a warranty. *Ibid.*
4. *Same—Quality of Merchandise.*—In the absence of warranty of the grade of merchandise sold and delivered, evidence that the merchandise was of inferior quality is inadmissible, though the purchaser could not have ascertained that the quality was inferior except in its use. *Ibid.*
5. *Same—Instructions.*—It is not error in the trial Judge to instruct the jury to find for the plaintiff, upon the whole evidence, in an action upon contract for goods sold and delivered, when the only defense set up was by way of counterclaim for breach of warranty, the defendant having failed to allege and prove a breach of warranty. *Ibid.*

WATER AND WATER COURSES.

Diverting Stream—Right of User—Extent of Right.—W. A., during his life, diverted the waters of R. Creek, so as to run into H. Creek to obtain additional water to supply his mill, and made an obstruction or dam in R. Creek at a certain height. After his death, his lands were partitioned among his heirs at law, and there was evidence that the plaintiff received the part upon which the mill was situated, with a provision, including the "full power of the mill shoal and water power on both sides of the mill, so as to keep it in

WATER AND WATER COURSES—*Continued.*

repair and convey water to the mill," and the defendant received that part on which the dam on R. Creek was situated. Plaintiff sued for damages for defendant's obstructing his right to the use of the waters of R. Creek for milling purposes. *Held,* (1) It was not error in the trial Judge to instruct the jury that the plaintiff had the right to use the waters of R. Creek to the same extent as they find, from the greater weight of the evidence, W. A. had diverted it, if it was in contemplation of the commissioners at the time they made the partition; (2) The verdict being for plaintiff, he had the right to enter upon defendant's lands for the purpose of keeping open the channel as originally used, and to keep up the dam at its original height; (3) The "full power" of the water is that required to run the mill with the dam at its original height, and it was not necessary for the jury, in this action, to find the quantity of water originally used. *Moore v. Parker,* 289.

WEIGHT OF EVIDENCE. See Evidence, 9, 75, 104.

WEIGHTS AND MEASURES.

Penalty Statutes—Interpretation of Statute.—Revisal, sec. 3073, requires every person using weights and measures to permit the standard-keeper to test them once in every two years, and imposes a penalty upon every person "using, buying or selling" who shall fail to comply with the requirements of the statute. *Held,* that the words "buying or selling" qualify and limit the word "using," imposing the penalty only on those "buying or selling by weights and measures." The history of the legislation in regard to weights and measures reviewed. *Nance v. R. R.,* 366.

WIFE'S ESTATE. See Husband and Wife, 2, 3.

WILFUL NEGLIGENCE. See Negligence, 14.

WILLS.

1. *Courts — Equitable Jurisdiction — Interpretation.*—The courts of equity have jurisdiction in matters of the construction of wills involving the administration of trusts, and when devises and legacies are so blended and dependant on each other as to make it necessary, to construe the whole to determine the respective rights of the beneficiaries. *Haywood v. Trust Co.,* 208.

2. *Interpretation of — Entire Instrument — Intention.*—A will should be construed as a whole to ascertain the intention of the testator there disclosed; and a general rule of construc-

WILLS—*Continued.*

tion must yield whenever a different intention is manifested from the language of the will to that otherwise inferred. *Ibid.*

3. *Same—Executors and Administrators—Trusts and Trustees—Guardian and Ward—Commissions—Power of Courts.*—A testator in his will bequeathed certain property to his infant daughter, and should she die leaving no child or children, then to his sister. Persons named were appointed executors and trustees "to carry out and perform the trusts therein declared." By a codicil to the will a guardian for the infant daughter was appointed, and the terms of the will ratified and confirmed in all other respects. *Held*, (1) The appointment of a guardian in the codicil was not inconsistent with the appointment of the trustees by the will to hold and control the property; (2) It is not necessary that title to the property be given in express terms, and the trustees, in this instance, are to take over, as trustees, the property from themselves, as executors, and hold and invest the same according to the terms of the will and for the period of time accordingly required; (3) It being conceded that the full income is for the infant daughter, it is to be paid to her guardian during her minority, and, thereafter, to her; (4) The guardian and executors should not receive full commission on account of monies disbursed between them, and the Court should make further and appropriate orders, after due notice, in relation thereto. *Ibid.*

4. *Sale of Lands Under — Conversion — Personalty.*— The proceeds of the sale of land made under the direction of the will are as personalty, and so regarded, under the equitable doctrine of conversion, as of the time of the death of the testator. *Ibid.*

5. *Trusts and Trustees — Deeds and Conveyances — Descriptive Words—Estate.*—A devise to N. of all the residue of testator's estate in trust to receive, hold, invest and reinvest, evidences the purpose of the testator to embrace therein both real and personal property. (*Foil v. Newsome*, 138 N. C., 115, cited and approved). *Powell v. Wood*, 235.

6. *Estate—Property Passed.*—Unless the contrary intent appears, the disposition by the testator in his will of the residue of his estate, will pass both real and personal property. *Ibid.*

7. *Intention — Presumption — All Property.*—The presumption is, that a testator intended by his will to dispose of all his property, and not to die intestate as to any part of it. *Ibid.*

8. *Executor and Administrator—Trusts and Trustees—Deeds and Conveyances—Power to Convey Implied.*—When a power is

WILLS—*Continued.*

given a trustee under a will to receive, hold and invest and reinvest, the estate of his testator, including lands, which is consistent with the other terms of the will, it confers the authority to sell the lands and make valid title thereto. *Ibid.*

9. *Estates — Tenant for Life — Deeds and Conveyances — Betterments, Recovered When.*—A claim for betterments may be set up by way of answer and recovered by the defendant, a grantee for value of a tenant for life in a deed conveying the fee, in an action to recover possession by the remainderman, when it appears that the life tenant, now deceased, held under a devise in a will under such terms or expression as to leave it uncertain whether the devise was of a life estate or the fee, and when the defendant made the improvements at a time he believed, and had good reason to believe, that he was the true owner. *Faison v. Kelly*, 282.

10. *Same—Evidence—Questions for Jury.*—When there is evidence that defendant had been in possession of lands, asserting absolute ownership for more than thirty years, under a deed conveying to him a title in fee, executed by a devisee thereof and by a trustee named in the will, and had put permanent improvements thereon; that the land had been bought and paid for by defendant, and the deed taken under advice of counsel learned in the law, that the deed conveyed the true title; that the lower Court construed the will to convey the fee, but was overruled by the Supreme Court, holding that only a life estate was devised, and that the remainderman was entitled to the possession as the owner of the fee. *Held*, the evidence is relevant to the inquiry, and the claim for betterments should be submitted to the jury. (*Merritt v. Scott*, 81 N. C., 385, cited and distinguished). *Ibid.*

WITNESSES.

1. *Deeds and Conveyances—Undue Influence—Evidence Impeaching—Opinion of Mental Condition—Hearsay Evidence.*—In an action to set aside a deed for undue influence, a party asked his own witness to give his opinion of the mental condition of the grantor's mind during the period of several weeks just prior to the execution of the deed. He had previously stated he did not know what his condition was. The Court, in its discretion, refused to allow the witness to answer. *Held*, no error for that (a) It would, to some extent, permit the party to cross-examine his own witness; (b) The answer to the subsequent question could only have been a conclusion or inference from hearsay, or the opinion of others, taking it without the rule that such opinion, to be competent, must come from the association or personal observation of the witness himself. *Myatt v. Myatt*, 137.

WITNESSES—*Continued.*

2. *Discretion of Court—Pleas Withdrawn.*—It is competent for the trial Judge, in determining whether he will allow a plea of "not guilty," formerly entered, to be withdrawn and the plea of "insanity" entered in its stead, to permit witnesses, who had seen defendant and had an opportunity to form an opinion as to his mental condition, to express their opinion thereon. *State v. Khoury*, 454.

3. *Larceny—Witness in Own Behalf—Evidence, Weight of—Instructions.*—The material question as to the correctness of the charge of the trial Judge, bearing upon the credibility of the evidence of defendant, a witness in his own behalf on a trial under indictment, is whether the jury was misled to defendant's prejudice, and it is not error for the lower Court to charge the jury that they should consider the interest he had, scrutinize his evidence closely, but they would not be warranted in refusing to believe his evidence because of the fact he was under indictment. *State v. Dixon*, 461.

4. *Appeal and Error — Improperly Sworn — Exception, When Taken.* — An exception that witnesses were not properly sworn, when no objection was made at the time, and none entered to their examination, cannot be entertained on appeal. *State v. Peterson*, 533.

5. *Murder—Weight of Evidence—Defendant a Witness.*—When a defendant on trial for a felony goes upon the stand in his own behalf without offering evidence as to his own character, the credibility of his testimony is in question, and the State may introduce evidence tending to show his bad character when it is confined to the purpose of contradiction, or of impeaching his evidence. *State v. Cloninger*, 567.

6. *Murder — Defendant a Witness — Character—Substantive Evidence.*—Evidence as to the character of defendant on trial for murder is substantive, when he goes upon the witness stand and introduces evidence of his good character. *Ibid.*

7. *Character Witnesses—Defendant a Witness—Examination.*—For the sole purpose of contradicting his testimony, it is competent for the State to cross-examine a defendant, a witness in his own behalf, on trial for murder, when he has introduced no evidence as to his character; and the cross-examination is not restricted to matters brought out on direct examination. Revisal, sec. 1634. *Ibid.*

WITNESSES, CREDIBILITY OF. See Questions for Jury, 1.

WRITTEN CONTRACTS. See Contracts, 10, 29.

WRITTEN DEMAND. See Penalty Statutes, 1.

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